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Supreme Court of the United States

OCTOBER TERM, 1961 2

No. ~~24~~ 24

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HALLIBURTON OIL WELL CEMENTING COMPANY,  
APPELLANT,

vs.

JAMES S. REILY, COLLECTOR OF REVENUE,  
STATE OF LOUISIANA.

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APPEAL FROM THE SUPREME COURT OF LOUISIANA

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FILED JULY 27, 1961

PROBABLE JURISDICTION NOTED, OCTOBER 9, 1961

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 264

HALLIBURTON OIL WELL CEMENTING COMPANY,  
APPELLANT,

vs.

JAMES S. REILY, COLLECTOR OF REVENUE,  
STATE OF LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA

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[fol. 3]

**IN NINETEENTH JUDICIAL DISTRICT COURT  
PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA**

No. 58,785—Division C

Honorable Jess Johnson, Judge presiding, was opened pursuant to adjournment.

HALLIBURTON OIL WELL CEMENTING COMPANY,

vs.

The Collector of Revenue, State of Louisiana,  
ROBERT L. ROLAND (Formerly James S. Reilly).

MINUTE ENTRY OF JUDGMENT—October 13, 1959

This case having come on regularly for trial pursuant to previous assignment and having been duly submitted to this court upon a stipulation of facts and the court now being of the opinion that the law and the evidence are in favor of the plaintiff and against the defendant, for written reasons assigned:

It Is Ordered, Adjudged and Decreed that there be judgment herein in favor of Halliburton Oil Well Cementing Company, and against the defendant, Robert L. Roland, Collector of Revenue of the State of Louisiana, in the sum of Forty-three Thousand Three Hundred Twenty-five and 63/100 (\$43,325.63) Dollars, plus interest at the rate of two per cent (2%) from December 13, 1956, until paid, and for all costs of this suit.

Judgment Rendered and Read in Open Court the ..... day of ..... 1959.

Judgment Signed in Open Court the 13th day of October 1959.

Jess Johnson, Judge, 19th Judicial District Court.

[fol. 5]

IN 19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

No. 58,785—Division "C"

HALLIBURTON OIL WELL CEMENTING CO.,

vs.

JAMES S. REILY, Collector of Revenue  
of the State of Louisiana.

PETITION—Filed December 13, 1956

To the Honorable the Judges of the Nineteenth Judicial District Court of the State of Louisiana, within and for the Parish of East Baton Rouge:

The Petition of Halliburton Oil Well Cementing Company, a Delaware corporation, domiciled in the City of Wilmington, Delaware, with its principal place of business in Duncan, Oklahoma, and having a permit to do business in the State of Louisiana, respectfully represents that:

## I.

Petitioner is engaged in the business of servicing oil wells throughout the oil producing states of the United States, including Louisiana, and its operations include, among other things, the operation and use—in Louisiana—of specialized oil well and oil field equipment, including but not limited to oil well cementing trucks and equipment and electrical oil well servicing trucks and equipment. Petitioner, however, does not sell such specialized equipment to the oil well or oil field operators but permits its use by means of agreements by virtue of which title to the equipment always remains in petitioner.

## II.

For the taxable years herein at issue, i. e., the calendar years 1952, 1953, 1954 and 1955, petitioner has regularly filed with the State of Louisiana a tax return showing the Use Tax moneys due to the State of Louisiana, and has paid to said State at the time of filing its statutory use tax returns, use tax moneys for said years as follows:

[fol. 6]

1952 .....	\$21,375.66	
1953 .....	33,646.01	
1954 .....	44,455.40	
1955 .....	23,355.54	(1st 5 months Only)
Total .....	<u>\$122,832.61</u>	

## III.

By letter dated September 29, 1955, directed to petitioner from the Department of Revenue, State of Louisiana, the Collector notified petitioner that it had determined a deficiency in the amount paid the State by petitioner, and proposed an assessment, against petitioner, for the Louisiana Use Tax, for the Period January 1, 1952, through May 31, 1955, as follows:

Proposed assessment (Use Tax) .....	\$50,588.58
Interest to August 30, 1955 .....	4,890.47
Total .....	<u>\$55,479.05</u>

A copy of this letter, of September 29, 1955 is attached hereto, and made a part hereof, as "Annexed No. 1". The detailed calculations of the Collector, which were attached to said letter as "Exhibit 'A'" thereto are not attached to this petition because of their bulk, but will be produced on the trial of this case.

## IV.

By written protest, signed by Robert O. Brown, Vice President and Attorney for Petitioner and G. D. McEnroe,

Treasurer of petitioner, on the 21st day of November, 1955, petitioner protested to and advised the Collector, and said Department of Revenue of the State of Louisiana, that it respectfully disagreed with the position of the Collector herein, and his proposed assessment, on the grounds that the proposed assessment was illegal and unconstitutional. A copy of said "Protest" is attached hereto, and made a part hereof, as "Annexed No. 2" to this petition.

## V.

By letter dated December 1, 1955, signed by Robert L. Roland, Attorney, for the Department of Revenue, directed to Mr. Robert O. Brown, Vice President and General Counsel of petitioner, the Collector advised petitioner, that, except as to duplications shown and certain proper-[fol. 7] ties which never came into Louisiana at all, the Collector adhered completely to its original position and insisted that the purported deficiency and proposed assessment of the Louisiana Use Tax be paid by petitioner. A copy of said letter is enclosed herewith and made a part hereof as "Annex No. 3". In this connection the petitioner states that it reviewed the audit which was used as a basis by the Department of Revenue, State of Louisiana, in making the aforesaid deficiency Use Tax against petitioner, and upon such review found numerous duplications and other errors as shown in reconciliation of additional Use Tax assessment which is attached hereto and made a part hereof as "Annex No. 4". Petitioner states that such reconciliation is limited to duplications and other errors and does not include petitioner's principal objection to such assessment as will more fully appear hereinafter.

## VI.

Subsequent oral conferences with representatives of the Collector were to no avail and therefore, in order to prevent formal proceedings against the petitioner by the Collector for the collection of said use tax moneys, petitioner on the 13 day of December, 1956, delivered to the Collector, pursuant to his demands, its check to his order in the sum of Fifty-seven thousand, two hundred seventy-eight dol-

lars and seventeen cents (\$57,278.17), and also a check for \$142.83 representing additional interest representing payment of the principal and interest upon said use tax money, Forty-three thousand, one hundred eighty-nine dollars and twenty-seven cents (\$43,189.27) (plus the proportionate part of said additional interest) of which petitioner denies are due to the State of Louisiana, as hereinafter shown in paragraph No. 10 of this petition. The manner of calculating the said sum, thus paid, is more fully shown by two letters, both dated November 8, 1956, one (attached hereto and made a part hereof as "annex No. 5") being addressed to the said Robert O. Brown from Victor H. Powers, Jr., of petitioner's Tax Department, and the other (attached hereto and made a part hereof as "Annex No. 6") being addressed from the said Robert O. Brown, General Counsel, to Taylor, Porter, Brooks, Fuller & Phillips, Attorneys, Baton Rouge, Louisiana.

[fol. 8]

## VII.

Said sum (\$57,278.17) and said \$142.83 was paid under protest, (the basis of which was fully set forth in written protest heretofore made a part of this petition as "Annex No. 2") and, at the same time, petitioner notified the Collector, in writing, that this suit would be brought under and pursuant to the laws of the State of Louisiana, and particularly Louisiana Revised Statutes of 1950, R.S. 47:1576, for the recovery and refunding to petitioner of said moneys, in principal and interest, plus legal interest on the whole.

## VIII.

By letter dated the 13 day of December, 1956, a duplicate original of which is attached hereto and made a part hereof, as "Annex No. 7", the Collector, acting through his Attorney, Robert L. Roland, acknowledged receipt of said sum of Fifty-seven thousand, two hundred seventy-eight dollars and seventeen cents (\$57,278.17), and said additional interest, in the sum of \$142.83 and advised petitioner, through its attorneys, that said sums had been received and would be segregated and held in escrow by

the State of Louisiana, all as is more fully provided by the laws of the State of Louisiana, and particularly R. S. 47:1576.

## IX.

As more fully appears from the foregoing, and from the Annexes hereto, and as will be more fully shown on the trial hereof, the proposed tax deficiency, and proposed assessment,—represented by the payment under protest hereinabove described—is founded upon three separate contentions by the State, namely:

1. For the purposes of calculating the Louisiana Use Tax upon items of specialized oil well equipment brought into the State of Louisiana and used therein by petitioner, the Collector would include not only the actual cost to petitioner of the physical equipment and parts purchased by petitioner outside of Louisiana, and incorporated (outside of Louisiana) into said specialized equipment, but [fol. 9] would also include the labor and shop overhead, incurred by petitioner in constructing said specialized field equipment in its own shops in Oklahoma. (This phase of the matter is hereinafter sometimes called "*The labor and shop overhead phase*" of this case.)
2. For the purpose of calculating the Louisiana Use Tax upon items of specialized oil well equipment brought into the State of Louisiana and used therein by petitioner, the Collector would take the "*original cost*" of all equipment brought into the State of Louisiana without making any allowance whatsoever for depreciation, regardless of the extent to which said equipment might be aged, worn out, or—in true fact—greatly depreciated in value, prior to its being brought into the State of Louisiana. (This phase of the matter is hereinafter sometimes called "*The cost price versus depreciated value phase*" of this case.)
3. For the purpose of calculating the Louisiana Use Tax upon items of specialized oil well equipment



brought into the State of Louisiana and used therein by petitioner, the Collector would refuse to exempt from the use tax the value of certain equipment (including but not limited to an airplane) which was purchased outside of Louisiana by petitioner, from vendors not regularly engaged in the business of selling such items. (This phase of the matter is hereinafter sometimes called "*The isolated sale phase*" of this case.)

[fol. 10]

### X.

As will be more fully shown on the trial of this case, the tax moneys demanded by the Collector—as aforesaid—and paid herein under protest (exclusive of said \$142.83 additional interest) as outlined above, are allocable to the three phases of this case as follows:

<i>Phase</i>	<i>Principal</i>	<i>Interest</i>	<i>Total</i>
1. The labor and shop overhead phase .....	\$30,942.20	\$5,181.29	\$36,123.49
2. The cost price versus depreciated value phase .....	2,296.83	373.01	2,674.84
3. The isolated sale phase .....	3,789.20	601.74	4,390.94
Total amount in dispute .....	\$37,028.23	\$6,161.04	\$43,189.27
Amount not in dispute .....	12,063.03	2,025.87	14,088.90
Totals .....	\$49,091.26	\$8,186.91	\$57,278.17

### XI.

As to each of the aforesaid three phases of this case, the taxpayer alleges—inter alia—that the Use Tax, if interpreted and applied as the Collector would interpret and apply it here would cast upon the taxpayer (petitioner) a burden more onerous than that which would be levied by

the Louisiana Sales and Use Tax had the transactions involved occurred in Louisiana; that a state Use Tax may be upheld as reasonable, legal and constitutional only insofar as the burden thereof is equal to, and not in excess of the burden of the Sales Tax of that same state, to which Sales Tax said Use Tax is complementary. And the taxpayer further alleges that:

A. The assessment proposed by the Collector, insofar as it results in a greater use tax liability than would be imposed under the sales tax if the transactions had taken place in Louisiana, is contrary to the terms and wording of the Louisiana taxing statute, as well as contrary to the intent and purpose of the Louisiana Legislature in enacting the taxing statute; and

[fol. 11]

B. The practical effect of the Collector's proposed assessment is to subject goods moving interstate commerce to a greater tax liability than would be imposed in the same situation, if all of the operative facts had occurred within the State of Louisiana, and therefore, the taxing statute (if interpreted and applied as the Collector would interpret and apply it here) would amount to a discrimination against interstate commerce prohibited by the Commerce Clause of the United States Constitution; and

C. The interpretation and application of the Louisiana Use Tax Statute, as proposed here by the Collector, is so unreasonable, arbitrary and capricious, and is so without regard to the true facts, and the economic realities of the actual situations, as to amount to a denial of due process of law within the meaning of the "due process" clause of the United States Constitution.

## XII.

Regulation of interstate commerce is a function explicitly reserved to the Congress of the United States by

virtue of the Constitution of the United States and particularly Article I, Section 8, Clause 3 thereof, and the tax here demanded and contended for by the Collector of Revenue of Louisiana directly infringes on that right of regulation vested in the Federal Congress, for the reason, among others, that is an attempt by the State of Louisiana to lay a tax on the privilege of engaging in interstate commerce and upon the carrying on of the business of interstate commerce.

### XIII.

Petitioner alleges that it would be deprived of its property without due process of law contrary to the protection and guaranty granted under the Constitution of the United [fol. 12] States and particularly under the Fourteenth Amendment thereof and under Article I, Section 2, of the Constitution of the State of Louisiana should it be required to pay said taxes and the refund herein claimed be denied to it.

### XIV.

As concerns 1. *The Labor and Shop overhead Phase* of this case, the petitioner states that the labor and shop overhead expenditure included in the Department of Revenue's, State of Louisiana, deficiency assessment resulting in an alleged additional tax liability, plus interest of Thirty-six thousand, one hundred twenty-three dollars and forty-nine cents (\$36,123.49), as heretofore shown in Paragraph X above, pertains to the manufacture, assembly, installation, and build up of the oil well service units employed by petitioner in its oil well service operations in the State of Louisiana. The oil well service units involved are generally known as an oil well cementing truck and equipment, and an electrical well logging truck and equipment. Attached hereto and made a part hereof marked "Annex No. 8" is a photograph of an oil well cementing truck and equipment. Also attached hereto and made a part hereof marked "Annex No. 9" is a photograph of an electrical well logging truck and equipment.

The petitioner maintains at its principal place of business in Duncan, Oklahoma Facilities and skilled employees

necessary in the manufacture, assembly, installation and build up of the aforesaid units. In conjunction with such activities petitioner maintains an engineering staff which is constantly engaged in research and development work essential in the maintenance and improvement of the service units to meet the requirements of field oil well service operations. Petitioner procures from various and sundry vendors throughout the United States all raw materials, semi-finished and finished articles necessary in the manufacture, assembly, installation and build up of such well service units. This further entails the maintenance of a considerable inventory of raw materials, semifinished and finished articles.—

[fol. 13] Petitioner further states that when a well service unit has been completely processed at Duncan, Oklahoma and has been tested for operation, such well service units are assigned to the various field camps of petitioner in the United States. The well service units obtain a permanent situs at such assigned location unless transferred to another field camp location where greater use may be made of it.

Petitioner further states that it does not manufacture, assemble, install and build such units at any place in the State of Louisiana for the reason it does not have the necessary facilities or employees for such an operation. The oil well service units involved in this controversy are not obtainable from any other manufacturer in the United States. Petitioner further states that it is not engaged in the "manufacture-and-sale" of such units.

Petitioner states that the Labor and Shop Overhead expenditure involved in this controversy amounts to One million, five hundred forty-seven thousand, one hundred nine dollars, and seventy cents (\$1,547,109.70) as shown more fully in column 5 of Annex No. 10 attached hereto, and made a part hereof. For the purpose of explanation, petitioner has recomputed and broken down the various items of value upon which the additional use tax assessment was made. By way of explanation and referring to Annex No. 10, petitioner states that Sixty-seven thousand, eight hundred seventy-two dollars and eighty-five cents (\$67,872.85) Labor and Shop Overhead was expended in the

process referred to above on depreciable assets transferred into Louisiana after such assets were first used in a state other than the State of Louisiana, and an additional One million, four hundred seventy-nine thousand, two hundred thirty-six dollars and eighty-five cents (\$1,479,236.85) Labor and Shop Overhead was expended in the same process referred to above on *new* oil well service units and supplies which were immediately transferred to the State of Louisiana. These two amounts are set out in column 3 and 4 and are totaled in column 5 of Annex No. 10. The total Labor and Shop Overhead expended on assets which were transferred into the State of Louisiana may therefore be [fol. 14] found in column 5 of Annex No. 10. It is this value upon which the State of Louisiana has assessed additional Use Tax in the amount of Thirty thousand, nine hundred forty-two dollars and twenty cents (\$30,942.20).

If petitioner had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax due and paid to the State of Louisiana upon the cost of the materials purchased in Louisiana and a Use Tax on such materials purchased outside of Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead. Therefore, the Louisiana Use Tax (as the Collector would here interpret and apply it) would place upon petitioner a tax burden solely and only because petitioner is conducting its shop operations at a location beyond the borders of the State of Louisiana, and is thereafter physically transporting its specialized oil well equipment across the interstate border of the State of Louisiana. In sum, the tax burden would fall upon persons who conduct such shop operations outside Louisiana, and then cross the state line in Louisiana, but such tax burden would not fall upon persons who conduct identical operations just inside the Louisiana interstate border line.

## XV.

As concerns 2. *The Cost Price v. Depreciated Value Phase* of this case, the petitioner shows that: This question involves an attempt on the part of the Department of

Revenue, State of Louisiana, to levy a use tax based upon the original cost price of the well service units transferred into Louisiana for operation therein by petitioner even though such well service units had been in operation in states other than the State of Louisiana prior to the date of transfer of such units into the State of Louisiana. The original material cost of such equipment which was first used in states other than Louisiana and later transferred into Louisiana is Seven hundred seventeen thousand, nine hundred ninety-two dollars and sixty-nine cents (\$717,992.69) as set out in column 2 of Annex No. 10. The state has therefore not given any consideration to the value of [fol. 15] this material at the time it was transferred into the state of Louisiana. Petitioner further states that depreciation as set out in column 8 of Annex No. 10 amounting to One hundred fourteen thousand, eight hundred forty-one dollars and fifty-two cents (\$114,841.52) was sustained on the material costs of assets transferred into Louisiana prior to the time of such transfer, and such depreciation was entirely ignored and disallowed by the Department of Revenue, State of Louisiana, in calculating the Use Tax.

The Department of Revenue has not only failed to take into consideration the One hundred fourteen thousand, eight hundred forty-one dollars and fifty-two cents (\$114,841.52) mentioned above, but it has also failed to take into consideration the depreciation sustained, Thirty-three thousand, two hundred sixty-four dollars and eighty cents (\$33,264.80) on assets which were purchased from vendors not regularly engaged in making sales of such assets. The depreciation sustained on the cost of such equipment is set out in column 7 of Annex No. 10, and the cost of the equipment purchased in isolated transactions is set out in column 1 of Annex No. 10. The petitioner contends that the entire One million, five hundred forty-seven thousand, one hundred nine dollars and seventy cents (\$1,547,109.70), Labor and Shop Overhead shown in column 5 of Annex No. 10 and referred to in Paragraph XIV above, is not subject to Louisiana Use Tax since such Labor and Shop overhead were expended by petitioner and not by another party or taxpayer. If however such amount, One million five hundred forty-seven thousand, one hundred nine dollars, and

seventy cents (\$1,547,109.70), Labor and Shop Overhead, is held to be subject to use tax, petitioner contends, in the alternative, that it should receive credit for depreciation sustained on it prior to the time of the transfer of the assets into Louisiana. The Labor and Shop overhead expended in the manufacture and assembly of assets which were first used outside of Louisiana amounted to Sixty-seven thousand, eight hundred seventy-two dollars and eighty-five cents (\$67,872.85) as shown in column 3 of Annex No. 10. [fol. 16] Depreciation sustained on this labor and shop overhead prior to the time of the transfer into Louisiana amounted to Twenty-seven thousand, three hundred dollars (\$27,300.00). This amount is set out in column 9 of Annex No. 10. ●

Petitioner states that the depreciation rates used in computing the depreciation sustained and set out in Annex No. 10 are the same rates as are used by the petitioner for Federal and State income tax purposes as well as securities and exchange purposes and book purposes. The rates of depreciation used are set out on the attached document marked "Annex No. 11".

Petitioner has stated above that the original material cost of assets manufactured by it and first used outside Louisiana and later transferred into Louisiana amounted to Seven hundred seventeen thousand, nine hundred ninety-two dollars and sixty-nine cents (\$717,992.69) as set out in column 2 of Annex No. 10. Depreciation sustained on such material cost and set out in column 8 of Annex No. 10 amounts to One hundred fourteen thousand, eight hundred forty-one dollars and fifty-two cents (\$114,841.52). It is the tax on the difference between these two values, Six hundred three thousand, one hundred fifty-one dollars and seventeen cents (\$603,151.17), or tax of Twelve thousand, sixty-three dollars and three cents (\$12,063.03), that petitioner does not contest and claims to be due the State of Louisiana. This amount of tax is set out in Paragraph X of this petition.

Petitioner further states to calculate the Louisiana Use Tax on the basis of original cost of such oil well service units is not in accordance with the provisions of the Loui-



siana Law, Section 47.303, which specifies that the use of tangible personal property in the State of Louisiana shall:

"be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event."

[fol. 17] Petitioner further states that the State of Louisiana is without taxing power and taxing jurisdiction to calculate Use Tax on the basis of original cost where tangible personal property is purchased and used, as above described outside of the State of Louisiana. It is a denial of due process of law to this taxpayer to have Louisiana Use Tax liability on depreciated tangible personal property on the basis of original cost where purchased and used outside the State of Louisiana. Petitioner further states that such tax is a denial of due process of law to this petitioner and places upon interstate commerce an unlawful burden designed to discriminate against such commerce.

## XVI.

As concerns 3. *The Isolated Sales Phase* of this case, the petitioner shows that it purchased fourteen (14) oil well cementing service units from the Spartan Tool and Service Company of Houston, Texas when that Company determined that it should no longer continue in the business of servicing oil wells. The Spartan Tool and Service Company was not engaged in the sale of such equipment, and made the sale to the petitioner only after it had decided to quit business. In addition thereto, petitioner purchased an airplane from the Western Newspaper Union of New York, which company is not regularly engaged in the business of selling airplanes. These purchases are set out in "Annex No. 12" which is attached hereto and made a part hereof. Petitioner states that the original cost of the above described purchases amounted to One hundred eighty-nine thousand, four hundred sixty dollars and nineteen cents (\$189,460.19) as set out in column 1 of Annex No. 10. The amount of tax assessed on such property which was brought into the State of Louisiana amounts to three thousand,

seven hundred eighty-nine dollars and twenty cents (\$3,789.20) as set out in Paragraph X of this petition. Petitioner states that the entire One hundred eighty-nine thousand, four hundred sixty dollars and nineteen cents (\$189,460.19) is not subject to Louisiana Use Tax because such [fol. 18] property would not have been subject to Louisiana Sales or Louisiana Use Tax had the purchase been made within the State of Louisiana, and the mere fact that the purchases were made outside the State of Louisiana and then brought into the State of Louisiana, does not alter the situation. If such property is held to be taxable however, petitioner states that depreciation sustained on such property in the amount of Thirty-three thousand, two hundred sixty-four dollars and eighty cents (\$33,264.80) prior to its transfer into Louisiana should be deducted from the original cost, thus making the tax payable Three thousand, one hundred twenty-three dollars and ninety-one cents (\$3,123.91) instead of Three thousand, seven hundred eighty-nine dollars and twenty cents (\$3,789.20). The amount of depreciation sustained on such isolated transactions prior to the time materials were brought into the State of Louisiana is set out in column 7 of Annex No. 10. Had such property been purchased by petitioner in the State of Louisiana, there clearly would have been no sales tax due. By levying a Use Tax upon the same property merely because it was purchased outside the State of Louisiana places upon petitioner a tax burden solely and only because petitioner made contracts of purchase at locations beyond the borders of the State of Louisiana, and then brought equipment into Louisiana.

Wherefore, petitioner prays that the Collector of Revenue of the State of Louisiana, James S. Reily, be duly cited to appear and answer this petition and that, after all legal delays and due legal proceedings are had, there be judgment herein in favor of petitioner, and against said Collector of Revenue in the sum of Forty-three thousand, one hundred eighty-nine dollars and twenty-seven cents (\$43,189.27) plus the proportionate part of the \$142.83 additional interest, and plus legal interest thereon from December 13, 1956, until payment is made, and for all costs of these proceedings.

Petitioner further prays for general and equitable relief.

[fol. 19] Halliburton Oil Well Cementing Company,  
By: Robert O. Brown, Vice President and General  
Counsel, Taylor Porter Brooks Fuller & Phillips,  
By B. B. Taylor, Jr., By C. M. Porter.

*Duly sworn to by Robert O. Brown, jurat omitted in  
printing.*

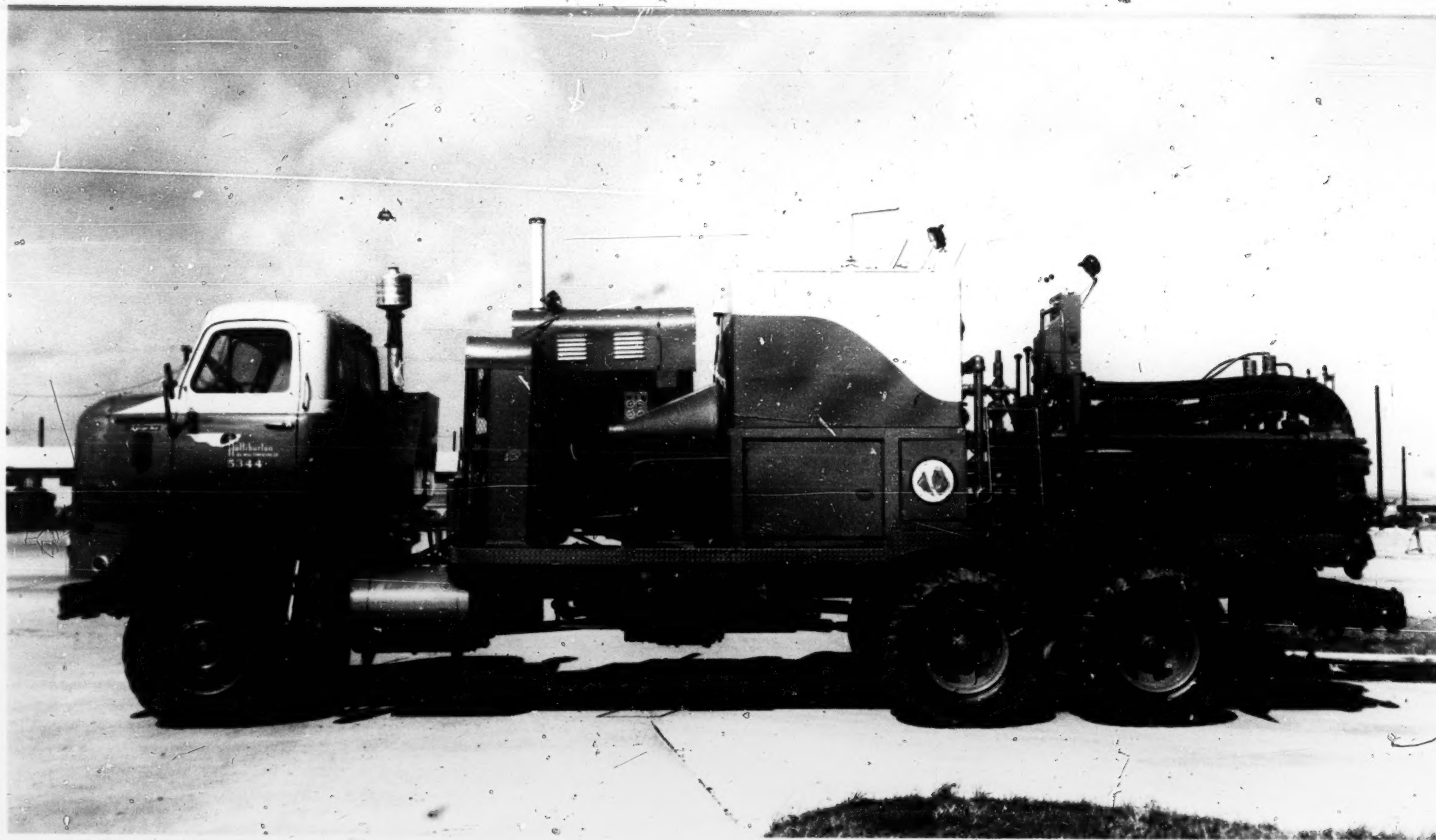
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[fol. 42] PHOTOGRAPH OF OIL WELL CEMENTING  
TRUCK AND EQUIPMENT

(Attached to Petition as "Annex No. 8")

ANNEX No. 8

(See Opposite 17)




[fol. 43]

PHOTOGRAPH OF ELECTRICAL WELL  
LOGGING TRUCK AND EQUIPMENT

(Attached to Petition as "Annex No. 9")

ANNEX No. 9

(See Opposite )





[fol. 51]

IN 19TH JUDICIAL DISTRICT COURT  
PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

[Title omitted]

ANSWER—Filed February 4, 1957

To the Honorable the Nineteenth Judicial District Court  
in and for the Parish of East Baton Rouge, State of  
Louisiana:

Now comes James S. Reily, Collector of Revenue for the  
State of Louisiana, appearing herein through undersigned  
counsel solely in his said official capacity, and for answer  
to plaintiff's petition says:

1.

Respondent admits the allegations of Paragraph 1.

2.

Respondent admits the allegations of Paragraph 2.

3.

Respondent admits the allegations of Paragraph 3.

4.

Respondent admits the allegations of Paragraph 4.

5.

Respondent admits the allegations of Paragraph 5.

6.

Respondent admits the allegations of Paragraph 6.



7.

Respondent admits the allegations of Paragraph 7.

8.

Respondent admits the allegations of Paragraph 8.

9.

Respondent denies the allegations of Paragraph 9.

10. ✓

Respondent denies the allegations of Paragraph 10.

[fol. 52]

11.

Respondent denies the allegations of Paragraph 11.

12.

The allegation of Paragraph 12 that the regulation of interstate commerce is a function explicitly reserved to the Congress of the United States is admitted. The remaining allegations of Paragraph 12 are denied.

13.

Respondent denies the allegations of Paragraph 13.

14.

Respondent denies the allegations of Paragraph 14.

15. ~

Respondent denies the allegations of Paragraph 15.

16.

Respondent denies the allegations of Paragraph 16.

Wherefore, the respondent prays that after due proceedings had, there be judgment rendered in respondent's favor,

and against the petitioner rejecting petitioner's demands; and for all such additional relief as law, equity and the nature of the case may permit.

Robert L. Roland, Levi A. Himes, Chapman L. Sanford.

[fol. 53] *Duly sworn to by Robert L. Roland, jurat omitted in printing.*

[fol. 54]

IN 19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

[Title omitted]

STIPULATION OF FACTS—Filed July 9, 1959

To the Honorable, the Judges of the Nineteenth Judicial District Court of the State of Louisiana, within and for the Parish of East Baton Rouge:

As a preliminary to this stipulation, the attention of the Court is respectfully called to the fact that the allegations of Paragraphs I, II, III, IV, V, VI, VII, and VIII, of the plaintiff's original petition, have been admitted by the Collector of Revenue, in the answer filed herein.

In addition to the allegations of fact stated in said paragraphs (I through VIII), it is agreed and stipulated by and between counsel for petitioner, Halliburton Oil Well Cementing Company, hereinafter called "Halliburton", and counsel for Collector of Revenue of the State of Louisiana, hereinafter called the "Collector", that the following facts are true and correct:

I.

This suit involves three issues:

1. For the purposes of calculating the Louisiana Use Tax upon items of specialized oil well equipment

brought into the State of Louisiana and used therein by petitioner, the Collector included the actual cost to petitioner of the physical equipment and parts purchased by petitioner outside of Louisiana, and incorporated, outside of Louisiana, into such specialized equipment, and also the labor and shop overhead, incurred by petitioner in constructing said specialized oil field equipment in its shops in Oklahoma. Halliburton admits that the physical equipment and parts should properly be included in the tax base, but denies that the labor and shop overhead were properly included. (This phase of the matter is hereinafter sometimes called "*The labor and shop overhead phase*" of this case.)

2. For the purpose of calculating the Louisiana Use Tax upon items of specialized oil well equipment brought into the State of Louisiana and used herein by petitioner, the Collector used the "original cost" of all equipment brought into the State of Louisiana without allowance for depreciation which had occurred prior to the equipment being brought into the State of Louisiana. Halliburton contends that the values used for computing the use tax due on this equipment should not be greater than the fair market value of the equipment at the time it was brought into Louisiana. (This phase of the matter is hereinafter sometimes called "*The cost price versus depreciated value phase*" of this case.)
3. For the purpose of calculating the Louisiana Use Tax upon items of equipment brought into the State of Louisiana and used herein by petitioner, the Collector assessed the use tax on the value of certain equipment (including specialized oil well equipment and an airplane) which was purchased outside Louisiana by petitioner, from vendors not regularly engaged in the business of selling such items. Halliburton denies that any sales tax or use tax is due to the State of Louisiana on these items. (This phase of the matter

is hereinafter sometimes called "*The isolated sale phase*" of this case.)

[fol. 56]

## II.

The tax moneys demanded by the Collector and paid herein under protest are allocable to the three phases of this case as follows:

<i>Phase</i>	<i>Principal</i>	<i>Interest</i>	<i>Total</i>
1. The labor and shop overhead phase .....	\$30,942.20	\$5,296.23	\$36,238.43
2. The cost price versus depreciated value phase .....	2,296.83	386.15	2,682.98
3. The isolated sale phase .....	3,789.20	615.02	4,404.22
Total amount in dispute .....	\$37,028.23	\$6,297.40	\$43,325.63
Amount not in dispute .....	12,063.03	2,032.34	14,095.37
Totals .....	\$49,091.26	\$8,329.74	\$57,421.00

## III.

As will appear in greater detail below, the three phases of this case, listed in Paragraph II above, are interrelated and overlapping, for the reason that a portion of the properties, which are the subject of Phase #1 (Labor and Shop Overhead Phase) and Phase #3 (Isolated Sale Phase), had sustained some depreciation prior to being brought into Louisiana.

## IV.

As concerns 1. *The Labor and Shop Overhead Phase* of this case, the labor and shop overhead expenditure included in the Department of Revenue's deficiency assess-

ment pertains to the manufacture, assembly, installation, and build up of the oil well service units employed by petitioner in its oil well service operations in the State of Louisiana. The oil well service units involved are generally known as oil well cementing trucks and equipment, and as electrical well logging trucks and equipment.

Attached to the original petition and made a part thereof marked "Annex No. 8" is a photograph of an oil well cementing truck and equipment. Also attached thereto and made a part thereof marked "Annex No. 9" is a photograph of an electrical well logging truck and equipment. Said two photographs are hereby made a part of this stipulation, by reference.

The petitioner maintains at its principal place of business in Duncan, Oklahoma, facilities and employees for the manufacture, assembly, installation and build up of the afore-[fol. 57] said units. In conjunction with such activities petitioner maintains an engineering staff which is engaged in research and development work essential in the maintenance and improvement of the service units to meet the requirements of field oil well service operations. Petitioner procures from various vendors throughout the United States raw materials, semi-finished and finished articles necessary for the manufacture, assembly, installation and build up of such well service units. This further entails the maintenance of a considerable inventory of raw materials, semi-finished and finished articles.

When a well service unit has been completely processed at Duncan, Oklahoma and has been tested for operation, such well service units are assigned to the various field camps of petitioner in the United States. The well service units obtain a permanent situs at such assigned location unless transferred to another field camp location where greater use may be made of it.

Petitioner does not manufacture, assemble, install and build such units at any place in the State of Louisiana. Petitioner is not engaged in the selling of such units and does not manufacture such units for sale.

As to Annex 10 of the original petition, it is stipulated that a responsible official of Halliburton, having accurate

knowledge of the facts, if called to the witness stand, would testify under oath as follows:

"The Labor and Shop Overhead expenditure involved in this controversy amounts to One million, five hundred forty-seven thousand, one hundred nine dollars, and seventy cents (\$1,547,109.70) as shown more fully in column 5 of Annex No. 10 attached to the original petition, and made a part of this stipulation, by reference. For the purpose of clarity, petitioner has recomputed and broken down the various items of value upon which the additional use tax assessment was made. By way of explanation and referring to Annex No. 10, Sixty-seven thousand, eight hundred seventy-two dollars and eighty-five cents (\$67,872.85) Labor and Shop Overhead was expended in the process referred to above on depreciable assets which were subsequently transferred into Louisiana after such assets [fol. 58] were first used in a state other than the State of Louisiana, and an additional One million, four hundred seventy-nine thousand, two hundred thirty-six dollars and eighty-five cents (\$1,479,236.85) Labor and Shop Overhead was expended in the same process referred to above on new oil well service units and supplies which were immediately transferred to the State of Louisiana without prior use in another state. These two amounts are set out in columns 3 and 4 and are totalled in column 5 of Annex No. 10. The total Labor and Shop Overhead expended on assets which were transferred into the State of Louisiana may therefore be found in column 5 of Annex No. 10. It is this value upon which the State of Louisiana has assessed additional Use Tax in the amount of Thirty thousand, nine hundred forty-two dollars and twenty cents (\$30,942.20)."

The Collector would object to such testimony as irrelevant and immaterial.

If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses

at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead.

## V.

As concerns 2. *The Cost Price v. Depreciated Value Phase* of this case, the Collector assessed a use tax based upon the original cost price of well service units transferred into Louisiana for operation therein by petitioner when such well service units had been theretofore in operation in states other than the State of Louisiana, and said equipment had sustained actual depreciation (not merely book depreciation) prior to the date of transfer of such equipment into the State of Louisiana.

As to Annex 10 of the original petition, it is stipulated that a responsible official of Halliburton, having accurate knowledge of the facts, if called to the witness stand, would [fol. 59] testify under oath as follows:

"The original material cost of such equipment which was first used in the states other than Louisiana and later transferred into Louisiana is Seven Hundred seventeen thousand, nine hundred ninety-two dollars and sixty-nine cents (\$717,992.69) as set out in column 2 of Annex No. 10. The state would not allow the deduction of the depreciation of this material, prior to the time it was transferred into the State of Louisiana. The depreciation as set out in column 8 of Annex No. 10 amounting to One hundred fourteen thousand, eight hundred forty-one dollars and fifty-two cents (\$114,841.52) was sustained on the material costs of assets transferred into Louisiana, prior to the time of such transfer, and such depreciation was not allowed as a deduction from original cost price, by the Department of Revenue, State of Louisiana, in calculating the Use Tax.

"The Department of Revenue did not allow as a deduction the One hundred fourteen thousand, eight hun-



dred forty-one dollars and fifty-two cents (\$114,841.52) mentioned above, and also did not allow as a deduction the depreciation sustained, Thirty-three thousand, two hundred sixty-four dollars and eighty cents (\$33,264.80) on assets which were purchased from vendors not regularly engaged in making sales of such assets. The depreciation sustained on the cost of such equipment is set out in column 7 of Annex No. 10, and the cost of the equipment purchased in isolated transactions is set out in column 1 of Annex No. 10. The petitioner contends that the entire One million, five hundred forty-seven thousand, one hundred nine dollars and seventy cents (\$1,547,109.70), Labor and Shop Overhead shown in column 5 of Annex No. 10 is not subject to Louisiana Use Tax since such Labor and Shop overhead were expended by petitioner and not by another party. If, however, such amount, One Million, five hundred forty-seven thousand, one hundred nine dollars and seventy [fol. 60] cents (\$1,547,109.70), Labor and Shop Overhead, is held to be subject to use tax, petitioner contends (in the alternative) that it should receive credit for depreciation sustained on it prior to the time of the transfer of the assets into Louisiana. The Labor and Shop overhead expended in the manufacture and assembly of assets which were first used outside of Louisiana amounted to Sixty-seven thousand, eight hundred seventy-two dollars and eighty-five cents (\$67,872.85) as shown in column 3 of Annex No. 10. Depreciation sustained on this labor and shop overhead prior to the time of the transfer into Louisiana amounted to Twenty-seven thousand, three hundred dollars (\$27,300.00). This amount is set out in column 9 of Annex No. 10.

"The original material cost of assets manufactured by petitioner and first used outside Louisiana and later transferred into Louisiana amounted to Seven hundred seventeen thousand, nine hundred ninety-two dollars and sixty-nine cents (\$717,992.69) as set out in column 2 of Annex No. 10. Depreciation sustained on such material cost and set out in column 8 of Annex No. 10 amounts to One hundred fourteen thousand, eight hun-

dréd forty-one dollars and fifty-two cents (\$114,841.52). It is the tax on the difference between these two values, Six hundred three thousand, one hundred fifty-one dollars and seventeen cents (\$603,151.17), or tax of Twelve thousand, sixty-three dollars and three cents (\$12,063.03), that petitioner does not contest and claims to be due the State of Louisiana."

The Collector would object to such testimony as irrelevant and immaterial.

## VI.

As concerns 3. *The Isolated Sales Phase* of this case, Halliburton purchased fourteen (14) oil well cementing service units from the Spartan Tool and Service Company of Houston, Texas when that company determined that it should no longer continue in the business of servicing oil [fol. 61] wells. The Spartan Tool and Service Company was not regularly engaged in the sale of such equipment, and made the sale to the petitioner only after it had decided to quit business. In addition thereto, petitioner purchased an airplane from the Western Newspaper Union of New York, which company is not regularly engaged in the business of selling airplanes. These purchases are set out in "Annex No. 12" which is attached to the original petition and made a part hereof, by reference. These purchases were casual, occasional and isolated sales, from the point of view of said vendors.

As to annex 10 of the original petition, it is stipulated that a responsible official of Halliburton, having accurate knowledge of the facts, if called to the witness stand, would testify under oath as follows:

"The original cost of the above described purchases amounted to One hundred eighty-nine thousand, four hundred sixty dollars and nineteen cents (\$189,460.19) as set out in column 1 of Annex No. 10 to the original petition. The amount of tax assessed on such property which was brought into the State of Louisiana amounts to Three thousand, seven hundred eighty-

nine dollars and twenty cents (\$3,789.20) as set out in Paragraph II of this Stipulation.

The Collector would object to such testimony as irrelevant and immaterial.

It is further stipulated that the entire One hundred eighty-nine thousand, four hundred sixty dollars and nineteen cents (\$189,460.19) would not have been subject to Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made within the State of Louisiana. Halliburton contends that the entire One hundred eighty-nine thousand, four hundred sixty dollars and nineteen cents (\$189,460.19) is not subject to the Louisiana Use Tax. However, if such property is held to be taxable, Halliburton contends (alternatively) that depreciation sustained on such property in the amount of Thirty-three thousand, two hundred sixty-four dollars and eighty cents (\$33,264.80) prior to its transfer into Louisiana should be [fol. 62] deducted from the original cost, thus making the tax payable Three thousand, one hundred twenty-three dollars and ninety-one cents (\$3,123.91) instead of Three thousand, seven hundred eighty-nine dollars and twenty cents (\$3,789.20). The amount of depreciation sustained on such isolated transactions prior to the time materials were brought into the State of Louisiana is set out in column 7 of Annex No. 10.

Chapman L. Sanford, Attorney for the Collector of Revenue, Defendant.

B. B. Taylor, Jr., of Taylor, Porter, Brooks, Fuller & Phillips, Attorney for Plaintiff.

Baton Rouge, La.  
July 9, 1959.

[fol. 112]

## IN 19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

[Title omitted]

JUDGMENT—October 13, 1959

This case having come on regularly for trial pursuant to previous assignment, and having been duly submitted to this Court upon a Stipulation of Facts, and the Court now being of the opinion that the law and the evidence are in favor of the plaintiff, and against the defendant, for written reasons assigned,

It Is Ordered, Adjudged and Decreed that there be judgment herein in favor of Halliburton-Oil Well Cementing Company and against the defendant, Robert L. Roland, Collector of Revenue of the State of Louisiana, in the sum of Forty-three Thousand Three Hundred Twenty-five and 63/100 (\$43,325.63) Dollars, plus interest at the rate of two per cent (2%) from December 13, 1956, until paid, and for all costs of this suit.

Judgment rendered and read in open Court the ..... day of ....., 1959.

Judgment signed in open Court the 13 day of October, 1959, at Baton Rouge, Louisiana.

Jess Johnson, Judge, 19th Judicial District Court.

[fol. 113] Clerk's Certificate to foregoing transcript (omitted in printing).

SUPREME COURT OF LOUISIANA

Number 44,934

HALLIBURTON OIL WELL CEMENTING COMPANY,

v.

JAMES S. REILY, Collector of Revenue of the State of Louisiana (Since Succeeded by Robert L. Roland).

MOTION TO SUBSTITUTE PARTY AND ORDER THEREON

—November 9, 1960

On motion of Roland Cocreham, Collector of Revenue, through undersigned counsel, and on suggesting to the Court that the defendant, James S. Reily, (lawfully succeeded by Robert L. Roland) in the above entitled and numbered proceeding was named in such suit as the duly commissioned and qualified Collector of Revenue of Louisiana and was sued as such in his official capacity, and that Robert L. Roland, was lawfully succeeded in that capacity by Roland Cocreham, who has been duly commissioned and qualified Collector of Revenue of the State of Louisiana, and therefore, mover desires that the name of Roland Cocreham be shown as the duly commissioned and qualified Collector of Revenue of the State of Louisiana, and that he be substituted as defendant in the above numbered and entitled proceedings in accordance with law.

It Is Ordered by the Court that Roland Cocreham in his official capacity as Collector of Revenue of the State of Louisiana, duly commissioned and qualified, be and he is hereby substituted as defendant in the above numbered and entitled cause.

New Orleans, Louisiana, this ..... day of November, 1960.

....., Chief Justice.

Baton Rouge, Louisiana,  
November 9, 1960.

Chapman L. Sanford, Attorney for the Collector of Revenue.

[fol. 116] *Duly sworn to by Chapman L. Sanford, jurat omitted in printing.*

SUPREME COURT OF LOUISIANA

Number 44,934

HALLIBURTON OIL WELL CEMENTING CO.,

vs.

JAMES S. REILY, Collector of Revenue of the  
State of Louisiana.

MOTION AND ORDER TO ADVANCE CAUSE TO PREFERENCE  
DOCKET AND SPECIALLY ASSIGN CASE FOR ARGUMENT

On motion of Halliburton Oil Well Cementing Company, plaintiff and appellee in the above-numbered and entitled cause, through undersigned counsel and on suggesting to the Court that the State of Louisiana is a party hereto; that the case involves important questions concerning the sales and use tax of the State of Louisiana on which this Honorable Court has not before decided; that many other cases are being held pending a decision in this case; and on further suggesting that this case should be placed on the preference docket and should be given a special assignment by the Court under the provisions of Section 4 of Rule IX of this Honorable Court,

It Is Ordered that this case be placed on the preference docket and be specially assigned for argument.

Signed in New Orleans, Louisiana, this ..... day of  
November, 1960.

....., Justice, Supreme Court of  
Louisiana.

By: B. B. Taylor, Jr., of Taylor, Porter, Brooks, Fuller  
& Phillips, 1100 Louisiana National Bank Building, Baton  
Rouge, Louisiana, Attorneys for Appellee.

[fol. 118] Certificate of service (omitted in printing).

[fol. 119]

SUPREME COURT OF LOUISIANA

No. 44,934

HALLIBURTON OIL WELL CEMENTING COMPANY,  
vs.

JAMES S. REILY, Collector of Revenue of the  
State of Louisiana.

On Appeal From the Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge,  
State of Louisiana

Honorable Jess Johnson, Judge

OPINION—February 15, 1961

HAMLIN, Justice.

The following two questions are presented for our determination on this appeal from a judgment rendered in favor of Halliburton Oil Well Cementing Company and against Robert L. Roland,<sup>1</sup> Collector of Revenue of the State of Louisiana, in the sum of \$43,325.63, plus 2% interest from December 13, 1956 until paid:

(1) In the calculation of the Louisiana Use Tax (LSA-R.S. 47:301 et seq.) assessed on equipment brought into the State of Louisiana from another state, should such tax be levied only on the component parts of the whole, where the owner himself fabricated and assembled the whole or finished product outside of the State of Louisiana, or should the tax be levied on the cost price of the finished fabricated product as set forth in the statute, supra, so as to include labor and shop overhead?

<sup>1</sup> James S. Reily, originally named as defendant, was lawfully succeeded in office by Robert L. Roland, who was substituted as defendant on July 16, 1959.



[fol. 120] (2) Is machinery or equipment purchased in another state through the transactions of so-called isolated sales and later brought into the State of Louisiana for use subject to the Louisiana Use Tax?

Halliburton Oil Well Cementing Company (hereinafter referred to as Halliburton) is engaged in the business of servicing oil wells throughout the oil producing states of the United States, including Louisiana. Its principal place of business is maintained in Duncan, Oklahoma, and there it manufactures, assembles, installs, and builds up specialized oil well service units which it employs in its oil well service operations. Halliburton procures from various vendors throughout the United States raw materials, semi-finished, and finished articles necessary for the manufacture, assembly, installation, and build-up of well service units. When a well service unit has been completely processed at Duncan, Oklahoma and has been tested for operation, it is assigned to one of Halliburton's various field camps in the United States, where it obtains a permanent situs unless transferred to another field camp location where greater use may be made of it. A certain number of these units came to rest in Louisiana and obtained a permanent situs therein servicing oil wells located in Louisiana. Halliburton's books are kept in Oklahoma; they reflect the cost value of the units as comprising material cost, labor cost, and shop overhead.

In addition to the above units, Halliburton keeps in Louisiana certain cementing service units it purchased from the Spartan Tool and Service Company of Houston, Texas when that company determined that it should no longer continue in the business of servicing oil wells, and an airplane purchased from the Western Newspaper Union of New York, which company is not regularly engaged in the business of selling airplanes.

[fol. 121] For the years 1952, 1953, 1954, and 1955, Halliburton regularly filed with the State of Louisiana tax returns showing the amount of use tax money, as reflected by its calculations, due the State of Louisiana by it on service units employed in the State. Such amounts were paid to the State of Louisiana at the time of filing the statutory use tax returns.

On December 13, 1956, after lengthy correspondence and numerous conferences, Halliburton paid to the Collector of Revenue of the State of Louisiana (hereinafter referred to as Collector), under protest (LSA-R.S. 47:1576), a deficiency tax assessment of \$57,278.17, representing principal and interest, and also paid additional interest of \$142.83; it denied that \$43,189.27, plus a proportionate part of the additional interest, was due the State of Louisiana. By stipulation the deficiency tax assessment was allocated in the following manner:

<i>Phase</i>	<i>Principal</i>	<i>Interest</i>	<i>Total</i>
1. Labor and shop overhead .....	\$30,942.20	\$5,296.23	\$36,238.43
2. Cost price versus depreciated value .....	2,296.83	386.15	2,682.98
3. Isolated sales .....	3,789.20	615.02	4,404.22
Total amount in dispute .....	\$37,028.23	\$6,297.40	\$43,325.63
Amount not in dispute .....	12,063.03	2,032.34	14,095.37
Totals .....	\$49,091.26	\$8,329.74	\$57,421.00

Halliburton brought suit for a return of the amount in dispute, *supra*, alleging that the Use Tax, if interpreted and applied as the Collector would interpret and apply it to Halliburton, would cast upon the taxpayer (Halliburton) a burden more onerous than that which would be levied by the Louisiana Sales and Use Tax had the transactions in-[fol. 122] volved occurred in Louisiana; and, that a state Use Tax may be upheld as reasonable, legal and constitutional, only insofar as the burden thereof is equal to and not in excess of the burden of the Sales Tax of that same state, to which Sales Tax said Use Tax is complementary. Plaintiff further alleged that the tax demanded of it infringed upon the right of regulation of interstate commerce by Congress (Article I, Section 8, Clause 3, Constitution of the United States), in that it was an attempt by the State of Louisiana to lay a tax on the privilege of engaging in interstate commerce and upon the carrying on of the busi-

ness of interstate commerce. It still further alleged that it would be deprived of its property without due process of law, contrary to the protection and guaranty granted under the Constitution of the United States and particularly under the Fourteenth Amendment thereof and under Article I, Section 2, of the Constitution of the State of Louisiana, should it be required to pay the tax assessed.

The trial court agreed with plaintiff and rendered judgment in its favor after trial on the following three issues:

"1. For the purposes of calculating the Louisiana Use Tax upon items of specialized oil well equipment brought into the State of Louisiana and used therein by petitioner, the Collector included the actual cost to petitioner of the physical equipment and parts purchased by petitioner outside of Louisiana, and incorporated, outside of Louisiana, into such specialized equipment, and also the labor and shop overhead, incurred by petitioner in constructing said specialized oil field equipment in its shops in Oklahoma. Halliburton admits that the physical equipment and parts should properly be included in the tax base, but denies that the labor and shop overhead were properly included. (This phase of the matter is hereinafter sometimes called '*The labor and shop overhead phase*' of this case.)

"2. For the purpose of calculating the Louisiana Use Tax upon items of specialized oil well equipment [fol. 123] brought into the State of Louisiana and used herein by petitioner, the Collector used the 'original cost' of all equipment brought into the State of Louisiana without allowance for depreciation which had occurred prior to the equipment being brought into the State of Louisiana. Halliburton contends that the values used for computing the use tax due on this equipment should not be greater than the fair market value of the equipment at the time it was brought into Louisiana. (This phase of the matter is hereinafter sometimes called '*The cost price versus depreciated value phase*' of this case.)

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<sup>2</sup> These issues appear in a stipulation of facts contained in the record.

"3. For the purpose of calculating the Louisiana Use Tax upon items of equipment brought into the State of Louisiana and used herein by petitioner, the Collector assessed the use tax on the value of certain equipment (including specialized oil well equipment and an airplane) which was purchased outside Louisiana by petitioner, from vendors not regularly engaged in the business of selling such items. Halliburton denies that any sales tax or use tax is due to the State of Louisiana on these items. (This phase of the matter is hereinafter sometimes called '*The isolated sale phase*' of this case.)"

Appellant (Collector) agrees that the trial court was correct in its ruling on Issue #2, "The cost price versus depreciated value phase," supra, in view of the holding of the Supreme Court of Louisiana, in the case of *Fontenot v. S. E. W. Oil Corporation*, 232 La. 1011, 95 So.2d 638, that a person importing an article for use in this state must pay the "use" tax the same as if it had been sold at retail, and that such use shall be considered equivalent to a sale at retail as of time of importation. The S. E. W. decision was handed down on May 6, 1957; the petition in the instant matter was filed on December 13, 1956, and judgment was rendered by the trial court on October 13, 1959. It is stated in appellant's brief:

"The Collector sought to impose the use tax on certain equipment which had sustained actual depreciation prior to its being brought into the State using as a tax base the original cost to the taxpayer. This Court has now held in the case of *Fontenot vs. S.E.W. Oil Corporation*, 232 La. 1011, 95 So.2d 638 (1957) that cost price means the fair market value of property [fol. 124] at the moment of taxation—the time it becomes a part of the mass of property of the State and not original cost at the time of acquisition.

"The Collector agrees that the reasoning of the S.E.W. case correctly analyzes the intent and purpose of the Louisiana Use Tax and therefore will not argue this phase."

The Collector urges that the district court erred in not finding that the incidence of the Louisiana Use Tax is non-discriminatory; that it is equal in its application because it is upon the use of tangible personal property after it has been withdrawn from commerce; that the combined effect and purpose of the Sales Tax and Use Tax is to insure that all tangible personal property used or consumed in the State of Louisiana bears a 2% tax, either at the time of its original sale at retail in the state or at the time of its first use in the state if a 2% sales tax has not already been paid by the user to any other state.

The law imposing the tax in question is contained in Chapter 2 of Title 47, Louisiana Revised Statutes, entitled, "Sales Tax." The provisions pertinent to this case read as follows:

LSA-R.S. 47:302:

"A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

"(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

"(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

[fol. 125] "C. \* \* \*

"The tax levied in this Section shall be collected from the dealer, as defined herein, shall be paid at the

time and in the manner hereinafter provided, and shall be, in addition to all other taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to taxes levied under the provisions of Chapter 3 of Sub-title II of this Title."

LSA-R.S. 47:301 (13) (As Amended):

"(13) 'Sales price' means the total amount for which tangible personal property is sold, including any services, except services for financing, that are a part of the sale valued in money, whether paid in money or otherwise, and includes the cost of materials used, labor or service costs, except costs for financing which shall not exceed the legal interest rate and a service charge not to exceed 6% of the amount financed, and losses; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold."

LSA-R.S. 47:301 (10):

"(10) 'Retail sale,' or 'sale at retail,' means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, and shall mean and include all such transactions as the collector, upon investigation, finds to be in lieu of sales; provided that sales for resale must be made in strict compliance with the rules and regulations. Any dealer making a sale for resale, which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax."

LSA-R.S. 47:301 (3):

"(3) 'Cost price' means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever."

LSA-R.S. 47:301 (18):

"(18) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business."

[fol. 126] LSA-R.S. 47:301 (4):

"(4) 'Dealer' includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution or for storage to be used or consumed in this state.

"'Dealer' is further defined to mean:

"(a) every person, who imports, or causes to be imported, tangible personal property from any state or foreign country for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state;

"(b) every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein;

"(c) any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this Chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of said tangible personal property;

\* \* \* \* \*

LSA-R.S. 47:303:

"The tax imposed under R.S. 47:302 shall be collectible from all persons, as hereinafter defined, engaged as dealers, as hereinafter defined.

"On all tangible personal property imported, or caused to be imported, from other states or foreign



country, and used by him, the 'dealer', as hereinafter defined, shall pay the tax imposed by this Chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this Chapter, the use, or consumption, or distribution, or storage to be used or consumed, in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event."

LSA-R.S. 47:305:

[fol. 127] "It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

"The provisions of this Chapter shall not apply in respect to the use, or consumption, or distribution, or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to, or greater than, the amount imposed by this Chapter has been paid in another state, the proof of the payment of such tax to be according to rules and regulations made by the collector of revenue. If the amount of tax paid in another state is not equal to, or greater than, the amount of tax imposed by this Chapter, then the dealer shall pay to the collector of revenue an amount sufficient to make the tax paid in the other state equal to the amount imposed by this Chapter.

"The 'use tax' under this Chapter shall not apply to tangible personal property owned or acquired in this

state, or imported into this state, or held or stored in this state, prior to June 7, 1948; but the 'use tax' will apply to all tangible personal property imported or caused to be imported into this state on or after that date, unless the property has previously borne a sales or use tax in another state, equal to or greater than the tax imposed by this Chapter."

The constitutionality of a use tax has been upheld by the Supreme Court of the United States in the case of *Henneford, et al. v. Silas Mason Co., Inc., et al.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814, wherein the Court stated that one of the effects of such a tax must be that local retail sellers will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. The Court further stated that another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state—buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. The Court then asked, "Do these consequences which must have been foreseen, [fol. 128] necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?" It answered its question as follows:

"The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, nondiscriminatory in its operation, when they have become part of the common mass of property within the state of destination. \* \* \* This is so, indeed, though they are still in the original packages. \* \* \* For like reasons they may be subjected, when once they are at rest, to a nondiscriminatory tax upon use or enjoyment. \* \* \* The privilege of use is only one attribute, among many of the bundle of privileges that make up

property or ownership. \* \* \* A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively. \* \* \* Calling the tax an excise when it is laid solely upon the use (*Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 49 P.(2d) 14) does not make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership. 'A nondiscriminatory tax upon local sales \* \* \* has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the state may be subjected.' *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147, 153, 52 S.Ct. 340, 341, 76 L.Ed. 673. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate. \* \* \* See, *Nelson v. Sears, Roebuck & Company*, 312 U.S. 359, 85 L.Ed. 888, 61 S.Ct. 586; *State v. Pape*, 194 La. 890, 195 So. 346; *Mouledoux v. Maestri*, 197 La. 525, 2 So. 2d 11.

We conclude that under the rulings of the above authorities the "use tax" as applied to plaintiff does not infringe upon the regulation of interstate commerce by Congress. The taxed matter herein had definitely come to rest in Louisiana and had acquired a situs in the State.

[fol. 129] Plaintiff endeavors to set forth the alleged inequality of the use tax as applied to it by arguing that if a local oil well servicing company had manufactured its own equipment in Louisiana it would only have had to pay a sales tax on the component parts employed, whereas plaintiff has been assessed a use tax not only on the component parts but also on the cost of labor and shop overhead. Plaintiff argues, as set forth, *supra*, that its burden, as compared to that of a local taxpayer, is so unequal as to constitute a violation of the 14th Amendment to the

United States Constitution and of Article I, Section 2,  
of the Constitution of Louisiana.

"When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guaranties of the Federal Constitution, the states have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The states, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the 14th Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may tax real and personal property in a different manner. It may grant exemptions. The state is not limited to ad valorem taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the 14th Amendment was intended to assure. \* \* \*

"With all this freedom of action, there is a point beyond which the state can not go without violating the equal protection clause. The state may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The state is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legis- [fol. 130] lation, so that all persons similarly circumstanced shall be treated alike.' *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 64 L.ed. 989, 990,

40 Sup. Ct. Rep. 560; \* \* \* Ohio Oil Company v. Conway, 281 U.S. 146, 74 L.Ed. 775, 50 S.Ct. 310. See, Allied Stores of Ohio, Inc. v. Bowers, 79 S.Ct. 437.

"What does 'equal protection of the laws' mean as applied to taxation? Equal protection cannot be said to be denied by a statute which operates alike on all persons and property similarly situated, or by proceedings for the assessment and collection of taxes which follow the course customarily pursued in the state.

"The inhibition of the amendment was designed to prevent any person or class of persons from being singled out as special subject for discriminating and hostile legislation. It does not require equal rates of taxation on different classes of property, nor prohibit unequal taxation so long as the inequality is not based upon arbitrary classification. Legislation which, in carrying out a public purpose, is limited in its application, does not violate the provision if, within the sphere of its operation, it affects alike all persons similarly situated. In other words it does not prohibit special legislation, or legislation that is limited either in the objects to which it is directed, or by the territory within which it is to operate. It 'merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' The rule of equality requires no more than that the same means and methods be applied impartially to all of the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. \* \* \* " Cooley, Taxation, Vol. 1, Fourth Edition, Section 249, p. 533<sup>o</sup> et seq. See, also, Section 259, p. 558, same volume.

We do not find that the Louisiana Use Tax treats any person differently from any other person in a like circumstance. All users are subjected to the same rate of tax; there is no arbitrary or unreasonable distinction. The

law contains no hostility nor discrimination; it singles out no class of persons as subjects for its assessment.

We do not find that the use tax as herein applied imposes an unconstitutional burden on plaintiff. Plaintiff's comparison, *supra*, is not apposite. There must be an incidence of taxation; there must be an occurrence which [fol. 131] brings the use tax into effect. In order to have an imposition of a sales tax, there must be a sale. Likewise, to have a levy of a use tax, property must come to rest in the State after leaving interstate commerce, and there must be a user of the property in the State. In the instant case, the fabricated product was transported to, came to rest in, became part of the common mass of property in, and was used in Louisiana. The proper comparison would be between the use tax on the assembled equipment and a sales tax on the same equipment if it were sold. What takes place before the fabricated product leaves interstate commerce and enters the State of Louisiana to rest is not within the contemplation of the statute except for the determination of cost price. Labor and shop overhead are considered incidentally together with other items as a basis for arriving at cost. LSA-R.S. 47:305 states that the intention of the Chapter is to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this State, of tangible personal property after it has come to rest in this State and has become a part of the common mass of property in this State.

LSA-R.S. 47:301 (3) recites that:

“‘Cost price’ means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever.”

LSA-R.S. 47:303, *supra*, states that use tax is paid on all articles of tangible personal property imported and used, the same as if the said articles had been sold at retail for use or consumption in this State. This section was properly

interpreted in the case of *Fontenot v. S. E. W. Oil Corporation*, 232 La. 1011, 95 So.2d 638, as follows:

[fol. 132] "According to this section the person importing an article for use in this state must pay the 'use' tax the same as if it had been sold at retail, and such use shall be considered equivalent to a sale at retail as of the time of importation. These provisions, along with the others above mentioned, clearly indicate that the 'use' tax is to be computed on the retail price the property would have brought when imported—that is, its then value or worth."

We conclude that with respect to Issue #1, "Labor and shop overhead phase," the use tax should be levied on "cost price" as set out in Chapter 2 of Title 47 of the Louisiana Revised Statutes, entitled "Sales Tax," supra; the trial court was in error in omitting labor and shop overhead from the valuation assigned to the fabricated service units for use tax assessment.

We now pass to the question of "isolated sales" involved herein.

In support of its contention that the use tax cannot be imposed on tangible property which has come to rest in Louisiana but was purchased in another state through the method of isolated sales, plaintiff relies on the case of *State of Alabama v. Bay Towing & Dredging Company, Inc.*, 90 So. 2d 743, wherein the Supreme Court of Alabama stated:

"As we see it, if the use tax act is construed as imposing a tax on the use in this state of tangible personal property purchased outside the state in casual and isolated sales transactions, such tax would constitute an unlawful discrimination against interstate commerce, contrary to the Commerce Clause of the United States Constitution, Const. art. 1, sec. 8, cl. 3, since no similar or equivalent tax burden is imposed in connection with the purchase of such property in casual and isolated sales transactions within the state. \* \* \*"



We might say at the outset that we do not feel constrained to follow the Alabama case, *supra*, because we find that the instant matter does not involve a question of interstate commerce. The alleged taxable property had come to rest in Louisiana and had acquired a situs in this State. *Henneford, et al. v. Silas Mason Co., Inc., et al., supra.* [fol. 133] Plaintiff argues that if the property alleged to be free from the assessment of the use tax (Issue #3, "Isolated sale phase") had been purchased in Louisiana under similar transactions, it would not have been assessed with a sales tax, and that, therefore, the levy of the use tax on the property deprives plaintiff of its property without due process of law.

In LSA-R.S. 47:301 (10), we find the statement that the term "sale at retail" does not include an isolated or occasional sale of tangible personal property by a person not engaged in such business. In LSA-R.S. 47:305, it is directed that the dealer shall pay the tax imposed by Chapter 2 of Title 47, entitled "Sales Tax," on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state.

The exemption of an isolated sale from the provisions of the sales tax applies strictly to sales within the State of Louisiana; it has no effect whatsoever on any transaction without the state. The direction that the use tax shall be paid in the same manner as if the articles had been sold at retail applies to the method of payment. The property involved herein has not borne a similar tax in another state. Therefore, since the State of Louisiana levied the first assessment on property which was transported to, came to rest in, became part of the common mass of property in, and was used in Louisiana, we find no discrimination nor deprivation of property without due process of law.

We conclude that the trial court was in error in disallowing the tax claimed by the Collector as to Issue #3, "Isolated sale phase."

As stated, *supra*, the trial judge rendered judgment in favor of Halliburton and against the Collector for \$43,- [fol. 134] 325.63, plus interest at the rate of 2% from December 13, 1956, until paid, and for all costs of this suit.

The Collector agrees that the trial court was correct in its ruling on Issue #2, "The cost price versus depreciated value phase," supra, amounting to \$2,682.98. Therefore, Halliburton is entitled to the return of this amount.

The trial court was in error in decreeing that all costs be paid by the Collector. LSA-R.S. 13:4521 provides:

"Except as hereinafter provided, neither the State, nor any parish, municipality, or other political subdivision, public board or commission, shall be required to pay court costs in any judicial proceeding instituted or prosecuted by or against the state or any such parish, municipality, or other political subdivision, board or commission. This Section shall have no application to stenographers' costs for taking testimony." See, also, *Per Curiam on Further Application for Rehearing in Louisiana-Nevada Transit Co. v. Fontenot, Collector of Revenue*, 233 La. 600, 97 So. 2d 409.

For the reasons assigned, the judgment appealed from in favor of plaintiff is amended by reducing the amount thereof from \$43,325.63 to \$2,682.98, with interest at the rate of 2% per annum from December 13, 1956, until paid. Appellee to pay all costs, except such as must be borne by appellant under the provisions of LSA-R.S. 13:4521.

[fol. 135]

[File endorsement omitted]

# SUPREME COURT OF LOUISIANA

[Title omitted]

APPLICATION ON BEHALF OF HALLIBURTON OIL WELL CEMENTING COMPANY, PLAINTIFF-APPELLEE, FOR REHEARING  
—Filed February 27, 1961

[fol. 136] To the Honorable, the Supreme Court of Louisiana:

The petition and application of Halliburton Oil Well Cementing Company, plaintiff and appellee in the above entitled and numbered matter, respectfully represents that

the decision of this Honorable Court rendered February 15, 1961, reversing the decision of the Nineteenth Judicial District Court, is grossly erroneous both in fact and law, insofar as it reverses the decision of the trial court, and a rehearing should be granted herein, for the following reasons:

1.

Said judgment is erroneous, contrary to law, and prejudicial to plaintiff-appellee for the reasons set forth in the Original Brief filed by plaintiff-appellee in this matter.

2.

Said judgment squarely holds that the State of Louisiana may levy an *excise tax* upon the activity of non-residents doing business in Louisiana which is greater than, and more burdensome than, the same *excise tax* would be where it falls upon the activity of residents of Louisiana engaged in exactly the same line of endeavor.

3.

Said judgment specifically approved and authorizes the State of Louisiana to discriminate against non-residents of Louisiana, doing business in Louisiana, and in favor of residents of Louisiana, by inflicting a discriminatory excise tax upon the non-residents, which is heavier than the comparable excise tax burden which falls upon Louisiana residents engaged in precisely the same activity.

4.

There can be no question but that the tax in question is an excise tax, and not a property tax. This court has so held, in dealing with the New Orleans sales tax, in *Mouledoux v. Macstri*, 197 La. 525, 2 So. 2d 11 (1941). This court [fol. 137] stated:

"It is our conclusion that the 'sales or use tax' . . . is an *excise tax* . . ." (197 La. at p. 504)

Unquestionably the Use Tax is an "excise tax", and not a property tax. This conclusion is universally reached.

See for example, *Brandtjen & Kluge v. Fincher*, 111 P. 2d 979, 980, 44 Cal. App. 2d Supp. 939. See multitude of cases cited in Words and Phrases, Vol. 15(a), p. 171, verbo "Excise."

The judgment of this Honorable Court erred by treating the sales and use tax as though it were a property tax and not an excise tax. For example, at page 2 of the opinion, it is stated:

"A certain number of these units came to rest in Louisiana and obtained a permanent situs therein servicing oil wells located in Louisiana."

And, at page 6 of this Court's judgment, the argument of the State (subsequently approved) is summarized:

"The Collector urges that . . . the Louisiana Use tax is non-discriminatory; that it is equal in its application because . . . the combined effect and purpose of the Sales Tax and Use Tax is to insure that *all tangible personal property* used or consumed in Louisiana bears a 2% tax . . ."

It is clear that the State is arguing here that the use tax should be regarded as a "property tax." Such argument is contrary to the square holding of this Court in *Mouldoux v. Maestri*. See above.

##### 5.

This Court has heretofore clearly established the distinction between a property tax and an excise tax. In *State ex rel. Porterie v. Hunt, Inc.*, 182 La. 1073, 162 So. 777 (1935), this Court stated:

"The distinction between a property tax and an excise tax is set forth in *Cooley on Taxation* (4th Ed.) vol. 1, p. 131, § 45, as follows, viz.:

"Generally the answer to the question whether a particular tax is a property tax or an excise tax is so apparent that there is no room for argument; but in [fol. 138] many phases the question has been the subject of much litigation, especially in regard to whether a tax on a corporation is an excise tax or a property

tax. If the tax is directly on property itself, the tax is a property tax; but a tax is an excise tax rather than a property tax where it is not a tax on property as such, *but upon certain kinds of property, having reference to their origin and their intended use.* Another thing to be noted, it has been said, is that the obligation to pay an excise tax is *based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation* which is the subject of the excise, and the element of absolute and unavoidable demand, as in the case of a property tax, is lacking." (at p. 1080-1081)

## 6.

It is clear, therefore, that the Louisiana Use Tax is an *excise tax* and that it is *not a property tax*. It is equally clear that An Excise Tax Is a Tax Upon an Activity. It is a tax upon the privilege of doing or performing a given thing. It is a tax upon the performance of an act. This settled conclusion is stated as follows:

"... in contrast to property taxes, *the actual subject of taxation in connection with an excise is some privilege or activity*, although various kinds of property may be in some way involved in the exercise of the privilege or activity taxed; and that an excise tax may, accordingly be roughly defined as a *tax upon the performance, carrying on, or exercise of some right, privilege, activity, calling or occupation.*" 51 Am. Jur. p. 1069, Taxation, Sec. 1255.

## 7.

It being conclusively settled that

1. *The Louisiana Use Tax is an "excise tax" and that*
2. *An excise tax is a tax upon the privilege of engaging in an activity,*

it becomes pertinent to compare the respective "activities" of the Louisiana resident and of the non-resident (Halliburton), with which we are here concerned.

## 8.

The United States Supreme Court has squarely held [fol. 139] that state taxation may not discriminate against the "stranger" from another state. To test for discrimination dealing with excise taxes, we must focus our attention on the *activities* of the Louisiana resident and the *activities* of the "stranger from afar" who is doing business in Louisiana—in this case—Halliburton. It is this "activity" which is the subject of the excise tax.

It cannot be questioned but that the *economic activity* of Halliburton in Louisiana, was that of a "manufacturer-user", i.e., a producer which uses the product which is produced, sometimes called a "producer-consumer". See pp. 3 and 69 of Appellee's Original Brief.

## 9.

*The Supreme Court of the United States has held:*

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to *determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.*" *Best & Co. v. Maxwell*, 311 U.S. 454, 61 S. Ct. 335.

## 10.

The requirement set up by the United States Supreme Court, in *Henneford v. Silas Mason Company*, 300 U.S. 577, 81 L. Ed. 841 (1936), for a valid use tax, is as follows:

"*Equality is the theme that runs through all sections of the statute . . .*

"When the account is made up, the stranger from afar is subject to *no greater burdens* as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but *the sum is the same when the reckoning is closed . . .*"

"In each situation the burden borne by the owner is balanced by *an equal burden* where the sale is strictly local . . ."

## 11.

The Louisiana Collector of Revenue has specifically [fol. 140] recognized that the Use Tax may not exceed the sales tax. Article 2-3 of the Regulations (quoted in full at p. 31 of our Original Brief) states:

"The two taxes, Sales and Use, stand as complements to each other and taken together provide *a uniform tax . . .*"

## 12.

And this Court, in the very opinion of which we seek a re-examination, stated that the idea of the Use Tax was to permit local residents to "compete upon terms of *equality . . .*" with persons from "other states." (at p. 9 of the opinion).

## 13.

Until the rendition of this decision in this Halliburton case, there existed no judicial utterance anywhere, nor any written or published utterance anywhere (save by the Collector herein), which suggested that the use tax might be so construed and enforced so as to require that the non-resident must

" . . . compete upon terms of *inequality . . .*"

with persons residing in Louisiana.

## 14.

Yet, in this case (and in this case juridically alone) it has been held that the Louisiana Collector of Revenue may levy an additional tax burden upon the "activities" of "strangers from afar", while at the same time exempting the "activities" of local residents from the burden of that tax. *The Collector has stipulated that he would discriminate against the non-resident.* We here quote those stipulations:



- I. "If Halliburton had . . . operated . . . at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead." (Tr. 57)
- II. "It is further stipulated that the entire . . . [purchase price] . . . would not have been subject to the Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made within the State of Louisiana." (Tr. 60)

[fol. 141] The Use Tax is *not* a property tax. The sales and use tax is an excise tax upon an economic activity. It is a tax upon the "doings" of the taxpayers; upon their economic activities. If, ". . . the stranger from afar . . ." is to bear a burden no heavier than that of ". . . the resident of Louisiana . . ." (as the Collector concedes, and even argues), then the only comparison that can be made is to compare the burden which falls upon the taxpayers in the two cases, by asking three simple questions:

- (1) What is the tax burden upon the *out-of-state taxpayer*, the "stranger from afar?"
- (2) What is the tax burden upon the *intra-state taxpayer*, the Louisiana resident?
- (3) *Are these two tax burdens equal?*

The Collector has stipulated that Halliburton (or a competitor of Halliburton in the same line of endeavor) would pay no sales or use tax if it set up its shops, and operated, in Louisiana. Yet the Collector demands a 2% use tax from Halliburton. How can the Collector seriously argue that this is equality of treatment?

And, even if we were to concede (arguendo) the validity of the Collector's approach, which we do not, his argu-

ment still falls far short of soundness. *Let us examine his "property tax" approach.*

If a Louisiana resident were to produce and create a finished product with his own hands, he would pay a sales tax on the parts he bought in Louisiana, and a use tax on the parts he brought in from outside the state. The State would collect 2% on all physical materials put into this finished piece of manufactured "property." *But the Louisiana resident would not pay either a sales tax or a use tax, nor any property tax, nor any sort of tax, on his own labor, and his own industry, and his own overhead.* The Collector has stipulated that, if Halliburton operated in Louisiana, the intangible element of labor and overhead would Not be taxed. Thus the 2% tax on the finished [fol. 142] intra-state "property" would *exclude* the value of the labor and overhead.

On the other hand, the Collector would *include* the value of the labor and overhead in valuing the "property", if the labor and overhead expense were incurred outside the state, and then transported (in interstate commerce) across the state line.

*There is simply no approach to this case, by which the Collector can soundly sustain his position.*

We repeat, the Collector ignores (and would have the Court ignore) the fact that Halliburton is a *manufacturer, which uses its own work product*. Halliburton is a "manufacturer-user," sometimes called a producer-consumer. The fairness, and legality, of Halliburton's tax burden cannot be determined by comparing its economic activity with that of an intra-state seller or *purchaser-at-retail*.

# 16.

We respectfully submit that this Court erred in holding (at p. 13 of its opinion) that, "... The proper comparison would be between the use tax on the assembled equipment and a sales tax upon the same equipment *If it were sold.*"

This is a conclusion that Halliburton may be taxed as *If* it had engaged in an activity in which (in fact) it did not engage. An excise tax may not be levied upon an "activity" that did not occur!

We respectfully submit that taxation cannot be levied upon assumptions which are admittedly contrary to fact.

The Collector argues that the tax burdens are equal (upon the Louisiana residents and the out-of-state persons) because the sales tax, paid by a *purchaser-at-retail* in Louisiana, includes labor and overhead.

With respect, this is an effort to compare the incomparable. The price paid by a *purchaser-at-retail* (upon which a sales tax is paid) includes three elements (a) the cost of the physical parts incorporated in the finished product, (b) the labor and overhead element, and (c) profit.

[fol. 143] It is perfectly proper to compare the sales tax upon a sale-at-retail in Louisiana, with a use tax levied upon property *purchased* outside the state. There the economic act upon which the incidence of the two taxes fall, is the same. And the tax burden is equal, falling upon all three above-named elements. We concede this.

But this is not what the Collector contends for here. He would compare the economic activity (the business endeavor) of an out-of-state "*manufacturer-user*" (Halliburton) with that of an *intra-state purchaser-at-retail*.

And this is the specious element in the Collector's argument.

We submit that the only fair comparison would be to compare the tax burden of an "*out-of-state manufacturer-user*," with the tax burden of an "*intra-state manufacturer-user*." In other words, if Halliburton had in Louisiana a direct competitor, in exactly the same operation, would the tax burden of each be the same?

Obviously, the Collector would demand the 2% use tax solely from Halliburton, the out-of-state operator, and he would exempt the intra-state operator. We submit that the Collector's position is discriminatory and illegal, that his position is unsound.

# 17.

Upon oral argument, one of the Justices of this Honorable Court engaged in substantially the following colloquy with counsel for the Collector:

*Question by the Court:*

"Would the tax upon the Louisiana resident be the same as the tax on the non-resident [producer-consumer]?"

*Counsel for Collector:*

[Answer not responsive to question]

Upon repeated questioning by the Court, Counsel for the Collector answered:

"No."

[fol. 144] *Question by the Court:*

"Would the use tax upon the non-resident [manufacturer-user] be greater than that upon the competing Louisiana resident?"

*Counsel for Collector [after considerable evasion]:*

"Yes."

*Question by the Court:*

"WHY?"

*Counsel for the Collector never answered this question.* It was because this question could not be answered that the Collector filed no brief in the trial court. It was because this question could not be answered that the Collector's brief lacks continuity and logic. Indeed, it lacks logic to such an extent that this Court, in writing its opinion, did not even try to follow the pattern of argument in the Collector's brief.

After five years consideration of the problem (Repeat: Five years), the Collector could not come up with a catenation of thought that this Court could follow. So the Court had to write an independent opinion.

This Court has actually held that it is all right for the State of Louisiana to erect a tax wall around the state,

so that a non-resident producer-consumer must pay a tax that the competing resident producer-consumer need not pay!

As one member of this Court remarked, at oral argument (in substance): "If the State can do that, could not it raise the Use Tax to 3%, or 10%, or 50%, while leaving the Sales Tax at 2%?" Of course it could.

If Your Honors do not see fit to reconsider this decision, it is the law of Louisiana that the sales tax could be repealed (on transactions within the state) while a use tax at the rate of 50%, or 100%, could be levied upon goods brought into the state across state lines. The decision cannot be interpreted otherwise.

We respectfully submit that such a decision is *not possible* in these United States. We beg the Court to reconsider.

19.

In five years of wrangling with the Collector over this problem, counsel for Halliburton was never able to obtain from the Collector, or any of his representatives, any articulation of reasons why the Collector's position was sound.

And when the Collector wrote his brief to this Court, he was still so unable to justify his position that he never addressed himself directly to the issue. And the issue, of course, is "*Why should Louisiana tax the non-resident producer-consumer more heavily than the resident producer-consumer?*"

It simply cannot be said. (Repeat: "Can-Not") be said there is no discrimination here. The case is submitted on stipulation. And, the Collector has stipulated:

*"If Halliburton had . . . operated . . . at a location within Louisiana . . .*

*. . . there would have been no Louisiana sales tax or use tax due on the Labor and Shop Overhead."*

We invited the Collector to face his own stipulation and to explain why it was not a "discrimination" against the

out-of-state operator, in favor of the intra-state competitor. The Collector never addressed himself to the problem.

We now respectfully invite this Court to address itself to the problem of whether or not this is not open, frank, and avowed Discrimination? If this is discrimination, then it is prohibited by the federal constitution. Quod Erat Demonstrandum.

## 20.

*The Collector has Stipulated that he would discriminate in this excise tax, in favor of the Louisiana resident and against his direct competitor who comes across state lines, but who engaged in precisely the same "activity."*

[fol. 146] *Please Note:*

*Let us assume that Halliburton had a direct competitor in exactly the same line of endeavor. And, let us assume that the competing plants were One-Inch apart, separated only by a fence that ran along the boundary line of this State. And, let us put Halliburton just outside the State of Louisiana while putting the competitor just inside the boundary line of the State.*

*Has not this Court held that the out-of-state operator (Halliburton) would have to pay the Labor-and-Shop Overhead tax Solely because it happened to put its plant One-Inch beyond the State Line? Would not the Collector place the tax upon the out-of-state operator solely because the products were transported that additional one-inch distance across the State line. Would not the Collector exempt from the tax the competing Louisiana operator, whose operation was one-inch closer to our State Capitol Building? Has not this Court placed its imprimatur of approval upon such one-inch type of discrimination? We submit that the question posed in this paragraph 20 should be thoughtfully considered.*

## 21.

The Collector has not denied that he would thus discriminate against the inter-state transaction. To the contrary, he has stipulated that he would discriminate.

The Supreme Court is the Court-of-Last Resort of Louisiana. *What this Court finally does will live forever in the printed and bound annals of the History of the United States of America.* As we see it (respectfully), this Court erred in approving the actions of the Collector when he interpreted the Use Tax so as to discriminate against the non-resident operator. The Louisiana Collector of Revenue is the tax collecting agency of the State. But the Collector is here before the highest judicial tribunal, which declares impartially between taxpayer and state. If the Collector was "wrong" in his discrimination, the taxpayer (under the American system) may seek relief before this Court. This the taxpayer has done in the sure anticipation that its cry for justice would be heard. The taxpayer here [fol. 147] reiterates that cry for justice. The taxpayer begs this Court to reconsider its decision.

The taxpayer does not challenge the Louisiana Use Tax, as unconstitutional. It does challenge the Collector's interpretation of the tax, in this particular case.

The taxpayer here sincerely believes that if Your Honors will critically re-read the Court's opinion, the Court will see fit to grant a rehearing. The taxpayer earnestly prays this Court—in its search for rightness—to thoughtfully re-examine its prior decision herein.

Wherefore, petitioner prays that a rehearing be granted in this cause, and that, after due proceedings had, the judgment rendered herein on the 15th day of February, 1961, be set aside and reversed and that judgment be entered herein affirming the decision of the Nineteenth Judicial District Court of the State of Louisiana, in favor of Halliburton Oil Well Cementing Company, as prayed for in the original petition.

Applicant further prays for all general and equitable relief.

Respectfully submitted,

Taylor, Porter, Brooks, Fuller & Phillips, Attorneys  
for Halliburton Oil Well Cementing Company,  
By B. B. Taylor, Jr.

Baton Rouge, Louisiana  
February 24, 1961.



## —Certificate—

We hereby certify that a copy of the foregoing petition and application for rehearing has this day been mailed, [fol. 148] postage prepaid, to Collector of Revenue, State of Louisiana, addressed as follows:

Mr. Roland Coereham, Collector of Revenue  
State of Louisiana  
c/o Legal Division  
Department of Revenue  
Capitol Annex Building  
Baton Rouge, Louisiana

Attention: Mr. Chapman Sanford, Attorney  
B. B. Taylor, Jr.

Baton Rouge, Louisiana

February 24, 1961.

[fol. 149]

SUPREME COURT OF THE STATE OF LOUISIANA

Court was duly opened, pursuant to adjournment. Present, Their Honors: John B. Fournet, Chief Justice, Joe B. Hamiter, Frank W. Hawthorne, E. Howard McCaleb, Walter B. Hamlin, Joe W. Sanders, and Frank W. Summers, Associate Justices.

MINUTE ENTRY OF ORDER DENYING PETITION  
FOR REHEARING—March 20, 1961

Action by the Court on Applications for Rehearings

Rehearings were refused in the following cases:

44,934 Halliburton Oil Well Cementing Co. v. James S. Reily, Collector of Revenue of the State of Louisiana.

[fol. 153]

## SUPREME COURT OF LOUISIANA

[Title omitted]

ORDER FOR SUPERSEDEAS, STAY OF EXECUTION AND  
STAY AND RECALL OF MANDATE AND STAY AND  
ARREST OF JUDGMENT—May 23, 1961

On consideration of the petition and motion of Halliburton Oil Well Cementing Company, plaintiff-appellee in the above numbered and entitled cause:

It Is Ordered that the execution and mandate and enforcement of the judgment and decree rendered in the above entitled and numbered cause be, and it is hereby, recalled, stayed, and arrested pending and until the 20th day of June, 1961, in order to permit Halliburton Oil Well Cementing Company to appeal herein to the Supreme Court of the United States, and (in the alternative) to seek a writ of certiorari from said Court and, in the event Halliburton Oil Well Cementing Company shall timely file a Notice of Appeal to the Supreme Court of the United States (or timely apply to said Court for writs of certiorari or review), then It Is Ordered that the execution and mandate, and enforcement of the judgment and decree rendered in the above entitled and numbered cause be, and it is hereby, recalled, stayed and arrested until the Supreme Court of the United States shall have made its final disposition of this case, and until the disposition of [fol. 154] this matter shall have become final, Roland Coereham, the Collector of Revenue of the State of Louisiana, and any successor to said office, is ordered and commanded to retain the tax moneys dependent upon this suit segregated and in escrow, in accordance with law and, in the event that the original record of the proceedings herein shall have been returned by this Court to the trial court, Valsin J. Courville, the Clerk of the Supreme Court of the State of Louisiana is ordered and commanded to recall said record, and obtain possession thereof, as quickly as this may be reasonably accomplished, and thereafter to hold the same in the possession of this Court, until further

order, pending said appeal or application for writs, the orders herein granted being conditioned upon Halliburton Oil Well Cementing Company furnishing bond with good and solvent surety in the amount of Five Hundred Dollars (\$500.00) conditioned according to law and further conditioned upon the said Halliburton Oil Well Cementing Company being liable for any and all damages which may accrue to the said Collector of Revenue of the State of Louisiana by reason of this supersedeas.

New Orleans, Louisiana, this 23rd day of May, 1961.

Jno. B. Fournet, Chief Justice, Supreme Court of the State of Louisiana.

[fol. 155]

SUPREME COURT OF LOUISIANA

[Title omitted]

SUPERSEDEAS BOND—May 23, 1961

Be It Known that whereas the undersigned Halliburton Oil Well Cementing Company has applied for and obtained from the Supreme Court of the State of Louisiana an order of supersedeas, staying and recalling the mandate herein and staying and arresting the judgment herein, and the execution thereof, pending the appeal of this cause to the Supreme Court of the United States (or, alternatively, the seeking of writs of certiorari or review from said Court), conditioned upon the furnishing of this obligation and bond,

Now Therefore, we the undersigned Halliburton Oil Well Cementing Company, as principal, and Great American Insurance Company, New York, New York, as Surety, do hereby promise and agree that the said Halliburton Oil Well Cementing Company shall prosecute its appeal (or alternatively, apply for writs of certiorari or review) to good effect and answer all damages and costs if it fail to make its plea good, and shall satisfy whatever judgment may be rendered against it upon the final disposition of this matter.

[fol. 156] And for the payment of which damages and costs, we the said Halliburton Oil Well Cementing Company and Great American Insurance Company, do by these presents firmly bind and obligate ourselves, our heirs, and legal representatives in solido, in the full sum of Five Hundred Dollars (\$500.00), in favor of Roland Cocreham, Collector of Revenue of the State of Louisiana.

Halliburton Oil Well Cementing Company, Principal, By: B. B. Taylor, Jr., Attorney and Agent-in-Fact.

Great American Insurance Company, Surety, By: Elsie Fridge, Agent-in-Fact.

#### Approval of Bond

The foregoing bond is hereby accepted and approved as to form and surety.

New Orleans, Louisiana, this 23rd day of May, 1961.

Jno. B. Fournet, Chief Justice, Supreme Court of Louisiana.

[fol. 158]

[File endorsement omitted]

SUPREME COURT OF LOUISIANA

No. 44,934

HALLIBURTON OIL WELL CEMENTING COMPANY

vs.

COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA  
(Since Succeeded by Roland Cocreham)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Filed June 2, 1961

I. Notice is hereby given that Halliburton Oil Well Cementing Company, the Appellee above named, hereby

appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Louisiana, entered in this suit on the 20th day of March, 1961 (said judgment having been initially rendered on the 15th day of February, 1961, and the finality thereof having been suspended by the timely filing of an Application for Rehearing, which Application for Rehearing was denied on the 20th day of March, 1961), which judgment upheld the validity of the Louisiana Sales and Use Tax Statute (La. R.S. 47:301, et seq.) as against the contention that said tax statute is repugnant to and violative of the Constitution of the United States.\*

This appeal is taken pursuant to Title 28 United States Code, par. 1257(2).

[fol. 159] II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The complete transcript of the proceedings had in the Nineteenth Judicial District Court of the State of Louisiana in and for the Parish of East Baton Rouge (which proceedings bear the number 58,785 on the docket of said District Court), in the form in which the same was filed with and before the Supreme Court of the State of Louisiana;
2. A complete transcript of all proceedings had in this matter in the Supreme Court of Louisiana, including but not limited to the following:
  - a. Motion to Substitute Parties filed November 15, 1960, and any order issued pursuant to same.
  - a-1. Motion for Special Preference.
  - b. The printed Brief on behalf of Halliburton Oil Oil Well Cementing Company filed on December 29, 1960, and Brief on behalf of Collector of Revenue.

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\* The opinion and judgment of the Louisiana Supreme Court is reported at 127 So. 2d 502.

- c. Opinion and Judgment of this Honorable Court rendered February 15, 1961.
- d. Application for Rehearing filed by Halliburton Oil Well Cementing Company on February 27, 1961.
- e. Extract from the Minutes of the Supreme Court of the State of Louisiana, showing Denial of the Application for Rehearing on March 20, 1961.
- [fol. 160] f. Application for Supersedeas, Stay and Recall of Mandate.
- g. Order of Supersedeas, Stay of Execution and Stay and Recall of Mandate and Stay and Arrest of Judgment.
- h. Supersedeas Bond and the Approval thereof by the Chief Justice of the Supreme Court of the State of Louisiana.
- i. This Notice of Appeal.

### III. Questions Presented by this Appeal:

The issue herein arises within the following framework:

1. The Louisiana Sales Tax, like the Sales Tax laws of other states, is levied only upon transactions which occur within the borders of the state, i.e., only upon intrastate transactions.
2. It was found (in Louisiana and elsewhere) that such sales taxes, falling only upon the intrastate transactions, tended to drive business out of the state. People would go outside the state for their major purchases, thus avoiding the intra-state Sales Tax.
3. Accordingly "compensating" Use Tax statutes were enacted to prevent discrimination against local merchants. The Use Tax falls solely upon the use, within the state, of goods acquired outside the state and when brought into the state across the interstate borderline. The Use Tax was designed to prevent discrimination against intrastate transactions.

[fol. 161] In Louisiana, the two taxes are combined into one statute, called the Sales and Use Tax Statute (La. R.S. 47:301, et seq.).

4. Since the Use Tax falls only upon the situation in which there has been an *interstate* movement of goods, such a statute was quickly attacked as repugnant to the interstate commerce clause of the Federal Constitution.
5. The Use Tax was upheld, as constitutional, and as Not a discriminatory burden upon interstate commerce, solely because (in the case then at issue) it did not exceed the comparable Sales Tax of the same state and was merely complementary to the sales tax and precisely equal to the sales tax, and—therefore—the Use Tax did not “discriminate” against the interstate transaction. *Henneford v. Silas Mason Company*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 841 (1936).
6. In a case, however, where the Use Tax of a state, falling solely on *interstate* transactions, is more onerous than the Sales Tax, falling on comparable *intrastate* transactions, then the Use Tax loses the fiat of the *Henneford* decision, and is unconstitutional because it does discriminate against the transactions which are in interstate transactions. This is the position of appellant taxpayer.
7. It is to be noted that the Louisiana Sales and Use Tax is an *excise* tax levied upon the privilege of performing an act. *Mouledoux v. Maestri*, 197 La. 525, 2 So. 2d 11 (1941).

The issue here is whether or not the State of Louisiana [fol. 162] (through its Collector of Revenue) may openly and avowedly discriminate against the taxpayer whose operations cross interstate border lines, and in favor of the competing taxpayer who operates wholly within Louisiana boundaries.



The result of the Louisiana Supreme Court decision is that Louisiana may discriminate against the interstate business. That Court has held that the Louisiana Use Tax (falling only on interstate operations) may be designed and enforced so as to place a heavier tax burden upon the interstate operations than the burden of the Sales Tax (falling only upon the comparable intrastate operations) would be. The decision is tantamount to a holding that Louisiana may erect a wall of taxes at the state line. The incidence of the additional tax burden falls upon the act of crossing the state border line.

There are two factual aspects to this case:\*

First: *"The Labor and Shop Overhead Phase"*

The Louisiana Collector here applies the Use Tax (to an interstate situation) with a burden more onerous than the burden which the Sales Tax would levy upon the comparable intrastate situation.

In its shops at Duncan, Oklahoma, appellant Halliburton produces and fabricates complex truck-borne oil-well servicing equipment which it uses in Louisiana. See Photographs Annex 8 and Annex 9 to the original Petition (Tr. 41-42). Halliburton uses this type of equipment in Louisiana, under contract, but does not sell the equipment.

If Halliburton had its shops in Louisiana, instead of in Oklahoma, a sales tax would fall upon its operations (i.e., the production and use of an item of equipment) as follows: (1) a sales tax would fall upon the purchase price of the [fol. 163] truck chassis when it was purchased by Halliburton and (2) a sales tax would fall upon the purchase price of each item of physical equipment (e.g., motors, pipes, metal, gaskets, etc.) which was purchased by Halliburton for incorporation into the finished product item. But, of course, there would be no sales tax whatsoever, and no use tax whatsoever upon the "labor and shop overhead" which went into the assembly operation, which transformed the raw

---

\* Initially there was a Third Phase to this case entitled "The Cost v. Depreciated Value" phase. That phase of the case is no longer at issue and appeal is not taken from the decision below, insofar as it relates to this phase of the case.

truck chassis and the other raw metal parts into the complex finished item which serves Louisiana oil producers so well. This is incontestable and uncontested.

In effect, the Collector had stipulated that his position is discriminatory:

"If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of the materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead." (Stipulation—Par. IV. Tr. 57)

Nevertheless, says the Collector, because Halliburton has its shops in Oklahoma, and not in Louisiana, an additional 2% tax must be paid. Because Halliburton operates its construction shops in Oklahoma and not in Louisiana, the Collector would demand a penalty tax measured by 2% of the "labor and shop overhead" expended by Halliburton, in its Duncan, Oklahoma, shops.

Obviously, the Collector would tax this Labor and Shop Overhead for the sole and only reason that it took place outside Louisiana. Halliburton contends that this is discrimination of the clearest and most elementary type.

Halliburton concedes that (as an out-of-state "manufacturer-user") it brings these complex and vastly useful [fol. 164] pieces of equipment into Louisiana, where they serve the Louisiana oil producers so well. And, Halliburton is quite willing to pay to the State of Louisiana a Use Tax in exactly the same sum as the State Tax would be, upon a comparable operation (by an intrastate "manufacturer-user") in Louisiana. But, says Halliburton, "No penalty should be levied upon us merely because we have our shops in Oklahoma and not in Louisiana."

It is unequivocally clear that, if Halliburton operated entirely in Louisiana, and had its shops in Louisiana, there would be neither any sales tax, nor any use tax, upon

the "labor and shop overhead" element which it put into its finished products. Halliburton respectfully submits that there should be no increase in its Louisiana tax burden, simply because it first creates its products in Oklahoma, and then moves them across the state line into Louisiana, where it uses them to serve Louisiana oil operators.

Halliburton contends that such a tax, based solely upon the movement of goods in interstate commerce, is discriminatory and is an unconstitutional burden upon interstate commerce.

Second: *"The Isolated Sales Phase"*

The Louisiana Sales Tax Statute (R.S. 47:301(10)) provides specifically that:

"... nor [shall the terms 'sale at retail'] include an isolated or occasional sale of tangible personal property by a person not engaged in such business."

The Louisiana Department of Revenue Sales Tax Regulations provide:

"Art. 2-33 Casual and Isolated Sales—

"The tax does not apply to casual and isolated sales by persons not engaged in the business of selling such tangible personal property ..."

[fol. 165] It is clear, therefore, that a "casual and isolated sale, by a person not engaged in the business of selling ..." the type of property at issue, is completely exempted from the Louisiana Sales Tax. This is uncontested.

The Collector of Revenue contends that the statute and regulations cannot be construed to grant a comparable "isolated sales" exemption in the case of the use tax. The Collector concedes that an "isolated or casual" sale made in Louisiana is exempted from the Louisiana sales tax. The Collector contends, however, that the use tax is levied by the taxing statute, and may properly fall upon the use, in Louisiana, of property which was acquired through an "isolated or casual sale" made in another state.

The issue is squarely raised here. Halliburton purchased certain oil field equipment from Spartan Tool and Service

Company, of Houston, Texas, when that concern went out of business. And it purchased an airplane from the "Western Newspaper Union, of New York." It is stipulated that neither of these vendors was in the business of selling such equipment. It is stipulated that such sales were "casual, occasional and isolated sales . . ." (Stipulation of Facts, Par. VI. Tr. 59-60.)

It is completely clear that if these "isolated sales," transactions had taken place within the borders of Louisiana, no sales tax would have fallen upon the transaction. Nor would any use tax have been incurred by anybody. This is stipulated.

The Collector's position, therefore, is that because these isolated sales occurred outside of Louisiana, the taxpayer must pay a two per cent "use" tax, that would not fall upon the use of the properties if the transactions had occurred in Louisiana. It is clear that this tax (aggregating \$4,404.22) is demanded by the Collector solely because the [fol. 166] isolated sales transactions occurred outside Louisiana and the goods thereafter were brought across the state line. Thus, the Collector concedes that, but for this element of interstate transportation, he would not be demanding this tax money at all.

Suppose Halliburton had taken delivery of the newspaper company's airplane at the Moisant Airport, in New Orleans, so that the sale was a Louisiana transaction. Obviously—no sales tax on this "isolated sale transaction." In the present case, the state demands the 2% use tax solely because the "isolated sale transactions" took place outside Louisiana and, thereafter, the airplane, etc., were transported, in interstate commerce, across the Louisiana state border line.

We quote from the Stipulation of Facts:

"It is further stipulated that the entire . . . [purchase price] . . . would not have been subject to the Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made within the State of Louisiana." (Tr. 60)

Reference is made to the decision in *State v. Bay Towing and Dredging Company, Inc.*, 90 So. 2d 743 (Alabama,

1956) in which the taxpayer's present position was precisely upheld.

Thus, the following questions are presented by this appeal:

1. Whether or not the State of Louisiana, through its Collector of Revenue, may apply an excise tax, the Louisiana Sales and Use Tax, so that the burden thereof bears more heavily upon a taxpayer who comes into Louisiana from outside the state than the burden of the same tax statute would bear upon a [fol. 167] Louisiana resident engaged in precisely the same economic activity as that of the more-heavily-taxed non-resident.
2. Whether or not the Supreme Court of the State of Louisiana may constitutionally render a judgment which specifically approves and authorizes the State of Louisiana to discriminate against non-residents of Louisiana, doing business in Louisiana, and in favor of residents of Louisiana, by inflicting a discriminatory excise tax upon the non-residents, which is heavier than the comparable excise tax burden which falls upon Louisiana residents engaged in precisely the same activity.
3. In view of the fact that the Supreme Court of the United States has held that:

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

*Best & Co. v. Maxwell*, 311 U.S. 454, 61 S.Ct. 335.

and in view of the fact that the requirement set up by the Supreme Court of the United States, in *Henneford v. Silas Mason Company*, 300 U.S. 577, 81 L.Ed. 841 (1936), for a valid state use tax, is as follows:

"Equality is the theme that runs through all sections of the statute . . .

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed . . ."

"In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local . . ."

[fol. 168] whether or not the State of Louisiana may tax (via its Sales and Use Tax) the non-resident ("the stranger from afar") more heavily than it would tax a resident Louisiana citizen engaged in the same identical business operation.

4. Whether or not the Louisiana Sales and Use Tax Statute, as applied by the Louisiana Collector of Revenue so as to tax non-residents more heavily than he would apply and levy the same excise tax upon Louisiana residents, is offensive to and repugnant to and violative of the Constitution of the United States, including but not limited to the following clauses thereof:

- a. *The Interstate Commerce Clause*, being Article I, Section 8, Clause 3, of the Constitution of the United States;
- b. *The Due Process Clause*, being a portion of the Fourteenth Amendment to the Constitution of the United States;
- c. *The Equal Protection of the Laws Clause*, being a portion of the Fourteenth Amendment to the Constitution of the United States;



it being the principal contention of Halliburton Oil Well Cementing Company (taxpayer herein) that the discriminatory tax burden, of which complaint is made, does fall upon persons who conduct a part of their operations outside the State of Louisiana and then cross the state line into Louisiana, whereas said tax burden does not fall upon persons who conduct identical operations entirely within the interstate border line of the State of Louisiana, and said taxpayer contends that such discriminatory taxation directly infringes upon the right of regulation of interstate commerce, vested in the Federal Congress, for the reason, among others, that it is an attempt by the State of Louisiana to lay an excise tax on the privilege of engaging in interstate commerce and upon the carrying on of a business in interstate commerce.

Alternatively, in the event that this appeal shall have been improvidently taken, Halliburton Oil Well Cementing Company prays that these papers, whereon this appeal was taken, be regarded and acted on as a petition for writ of certiorari in accord with the provisions of 28 U.S.C. 2103.

Charles Vernon Porter and Benjamin Brown Taylor, Jr., of Taylor, Porter, Brooks, Fuller & Phillips, Attorneys for Halliburton Oil Well Cementing Company, Appellant in Connection with the Appeal here Prosecuted to the Supreme Court of the United States, 1100 Louisiana National Bank Building, Baton Rouge, Louisiana.

Of Counsel: Taylor, Porter, Brooks, Fuller & Phillips, 1100 Louisiana National Bank Building, Baton Rouge, Louisiana.

Proof of Service (omitted in printing).

[fol. 171] Clerk's Certificate to foregoing transcript (omitted in printing).



[fol. 172]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—October 9, 1961

Appeal from the Supreme Court of the State of Louisiana.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 9, 1961

IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1961

No. ~~2014~~ 211

**HALLIBURTON OIL WELL CEMENTING COMPANY,**

**Appellant**

*versus*

**JAMES S. REILY, COLLECTOR OF REVENUE, STATE  
OF LOUISIANA (Since Succeeded by Robert L. Roland,  
Who Was Duly Succeeded by Roland Cocreham),**

**Appellee**

**ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF LOUISIANA**

**JURISDICTIONAL STATEMENT**

**Filed by Appellant**

Robert O. Brown,  
General Counsel for Appellant

Robert E. Rice,  
Assistant General Counsel  
Duncan, Oklahoma

Of Counsel:

Laurance W. Brooks  
James R. Fuller  
Charles W. Phillips  
William G. Randolph  
Frank W. Middleton, Jr.  
Robert J. Vandaworker  
Tom F. Phillips

C. Vernon Porter  
and  
Benjamin B. Taylor, Jr.

%Taylor, Porter, Brooks,  
Fuller & Phillips, Attys.  
1100 La. Nat'l Bank Bldg.  
Baton Rouge, Louisiana

Counsel of Record, Upon  
Whom Service May Be Made

Baton Rouge, Louisiana  
July 19, 1961

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1961

No. \_\_\_\_\_

**HALLIBURTON OIL WELL CEMENTING COMPANY,**

**Appellant**

*versus*

**JAMES S. REILY, COLLECTOR OF REVENUE, STATE  
OF LOUISIANA (Since Succeeded by Robert L. Roland,  
Who Was Duly Succeeded by Roland Cocreham),**

**Appellee**

---

**ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF LOUISIANA**

---

**JURISDICTIONAL STATEMENT**

Appellant appeals from the final judgment and decision of the Supreme Court of the State of Louisiana\* entered in this suit on the 20th day of March, 1961, which set aside and reversed the judgment of the Nineteenth Judicial District Court of the State of Louisiana, in and for the Parish of East Baton Rouge. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

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\* The highest court of the State of Louisiana.

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana is reported at \_\_\_\_\_ La. \_\_\_\_\_, 127 So. 2d 502, and a copy thereof is attached hereto as Appendix "A," p. 49, *infra*. The opinion of the trial court, September 25, 1959, is not reported, but is found at p. 65, et seq. of the Record.

## JURISDICTION

This is a suit for a refund of tax moneys paid under protest. The taxing statute in question is the Louisiana "Sales Tax,"\* commonly called the "Sales and Use Tax." The suit for refund is specifically authorized by, and properly brought under, the provisions of Louisiana Revised Statutes 47:1576. This is uncontested.

The Louisiana Supreme Court held that the Louisiana Collector of Revenue may "discriminate" against, and tax more heavily, a taxpayer who moves his goods across state lines (as compared to the taxpayer engaged in purely intrastate business); that Louisiana may thus levy an excise tax upon the privilege of moving goods in interstate commerce.

The issue is whether or not such frankly discriminatory taxation is offensive to the Constitution of the United States, including particularly the Interstate Commerce Clause (Article I, Sec. 8, Clause 3), and/or the Fourteenth Amendment. The trial court held that the discriminatory excise tax was a burden upon interstate commerce, which was violative of the Federal Constitution, and that the heavier excise tax (falling solely upon the taxpayer who brought his goods into Louisi-

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\* La. R.S. 47:301, et seq. See Appendix "B," p. 69, *infra*.

ana, across the state line) was also a denial of due process and of the protection of the laws, guaranteed by the Fourteenth Amendment of the Federal Constitution. The Louisiana Supreme Court reversed and held that Louisiana may collect the heavier excise tax from the individual who uses chattels moved into Louisiana from outside the state, while exempting from the same tax burden the individual who uses chattels produced in Louisiana, and which thus lack the element of interstate transportation.

The Supreme Court of the State of Louisiana initially rendered its decision on the 15th day of February, 1961. Application for Rehearing was timely filed by present appellant, on the 27th day of February, 1961, and said Application for Rehearing suspended the finality of the decision of the Louisiana Supreme Court until that court denied the Application for Rehearing, on the 20th day of March, 1961, at eleven o'clock a.m. (Louisiana Code of Civil Procedure, Articles 2166-2167).

Notice of Appeal to the Supreme Court of the United States was timely filed by appellant, in the Supreme Court of the State of Louisiana, on the 2nd day of June, 1961.

The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the Louisiana court, on direct appeal, in this case: *Henneford v. Silas Mason Company*, 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814 (1936); *Northwestern States Portland Cement Company v. Minnesota*, 358 U. S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421, 67 ALR 2d 1292 (1959); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 72 S.



Ct. 424, 96 L. Ed. 436 (1952); *Nippert v. City of Richmond*, 327 U. S. 416, 66 St. Ct. 586, 90 L. Ed. 760, 162 ALR 844 (1946); *Freeman v. Hewitt*, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265 (1946).

The Louisiana taxing statute, the validity of which is attacked, is the Louisiana Sales and Use Tax, Louisiana Revised Statutes of 1950, Title 47, Sections 301-318. A copy of that statute is attached hereto, as Appendix "B", *infra*, p. 69.

## QUESTIONS PRESENTED

The issue herein arises within the following framework:

1. The Louisiana "sales tax" (as distinguished from the "use tax"), like the sales tax of other states, is levied only upon transactions which occur within the borders of the state, i.e., only upon intrastate transactions.

2. It was found (in Louisiana and elsewhere) that such sales taxes, falling only upon the intrastate transactions, tended to drive business out of the state. People would go outside the state for their major purchases, thus avoiding the intrastate sales tax.

3. Accordingly "compensating" Use Tax statutes were enacted to prevent such discrimination against local merchants. The use tax falls solely upon the use, within the state, of goods acquired outside the state and then brought into the state across the interstate borderline. The Use Tax was designed to prevent discrimination against intrastate transactions. In Louisiana, the two taxes were combined into one

statute known as "The Sales and Use Tax" Statute (La. R.S. 47:301, et seq.). Appendix "B," *infra*, p. 69.

4. Since the Use Tax falls only upon the situation in which there has been an **interstate** movement of goods, such a statute was quickly attacked as repugnant to the interstate commerce clause of the Federal Constitution.

5. The Use Tax was upheld by this court, as constitutional, and NOT a discriminatory burden upon interstate commerce, because (in the case then at issue) it did not exceed the comparable sales tax of the same state and was merely complementary to the sales tax and precisely equal to the sales tax, and—therefore—the use tax did not "discriminate" against the interstate transaction. *Henneford v. Silas Mason Company*, 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814 (1936).

6. In a case, however, where the use tax of a state, falling solely on **interstate** transactions, levies a burden which is more onerous than the sales tax, falling on comparable intrastate transactions, then the use tax loses the fiat of the *Henneford* decision, and is unconstitutional because it does discriminate against the transactions which are in interstate commerce. This is the essential position of appellant taxpayer.

7. It is to be noted that the Louisiana Sales and Use Tax is an **excise** tax levied upon the privilege of performing an act. *Mouledoux v. Maestri*, 197 La. 525, 2 So. 2d 11 (1941). See also *Brandtgen & Kluge v. Fincher*, 111 P. 2d 979, 980, 44 Cal. App. Supp. 939, and Words & Phrases, Vol. 15 (a), p. 171, verbo "Excise."

\* \* \*

The issue here is whether or not the State of Louisiana

(through its Collector of Revenue) may openly and avowedly discriminate against the taxpayer whose operations cross interstate border lines, and in favor of the competing taxpayer who operates wholly within Louisiana boundaries.

The Louisiana Supreme Court has held that the Louisiana Use Tax may be designed and enforced so as to place a heavier excise tax burden upon interstate operations than the excise tax burden of the Sales Tax which falls upon comparable intrastate operations. The decision is tantamount to a holding that Louisiana may erect a wall of taxes at the state line. The incidence of the additional excise tax burden falls upon the act of crossing the state border line.

Thus, the following questions are presented by this appeal:

1. Whether or not the State of Louisiana, through its Collector of Revenue, may apply an excise tax, the Louisiana Sales and Use Tax, so that the burden thereof bears more heavily upon a taxpayer who comes into Louisiana from outside the state than the burden of the same tax statute would bear upon a Louisiana resident engaged in precisely the same economic activity as that of the more heavily taxed non-resident.

2. Whether or not the Supreme Court of the State of Louisiana may constitutionally render a judgment which specifically approves and authorizes the State of Louisiana to discriminate against non-residents of Louisiana, doing business in Louisiana, and in favor of residents of Louisiana, by inflict-

ing a discriminatory excise tax upon the non-residents, which is heavier than the comparable excise tax burden which falls upon Louisiana residents engaged in precisely the same activity.

3. Whether or not the State of Louisiana may tax (via its Sales and Use Tax) the non-resident ("the stranger from afar") more heavily than it would tax a resident Louisiana citizen engaged in the same identical business operation, in view of the fact that the Supreme Court of the United States has held that:

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

*Best & Co. v. Maxwell*, 311 U. S. 454, 61 S. Ct. 335, 85 L. Ed. 275 (1940).

and in view of the fact that the requirement set up by the Supreme Court of the United States, in *Henneford v. Silas Mason Company*, 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814 (1936), for a valid state use tax, is as follows:

"Equality is the theme that runs through all sections of the statute. . . .

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. . . ."

1883

"In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local.

4. Whether or not the Louisiana Sales and Use Tax Statute, as applied by the Louisiana Collector of Revenue so as to tax non-residents\* more heavily than he would apply and levy the same excise tax upon Louisiana residents, is offensive to and repugnant to and violative of the Constitution of the United States, including but not limited to the following clauses thereof:

- a. **The Interstate Commerce Clause**, being Article I, Section 8, Clause 3, of the Constitution of the United States;
- b. **The Due Process Clause**, being a portion of the Fourteenth Amendment to the Constitution of the United States;
- c. **The Equal Protection of the Laws Clause**, being a portion of the Fourteenth Amendment to the Constitution of the United States;

it being the principal contention of Halliburton Oil Well Cementing Company (taxpayer herein) that the discriminatory excise tax burden, of which complaint is made, does fall upon persons who conduct a part of their operations outside the State of Louisiana and then cross the state line into Louisiana; whereas said excise tax burden does not fall upon per-

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\* Of course, the heavier excise tax would also fall on a Louisiana resident who chose to conduct the production part of his operations in another state, and then moved his chattels into Louisiana, for use. It is the multi-state operation and interstate movement which gives rise to the additional tax.

sons who conduct identical operations entirely within the interstate border line of the State of Louisiana, and said taxpayer contends that such discriminatory taxation directly infringes upon the right of regulation of interstate commerce, vested in the Federal Congress, for the reason, among others, that it is an attempt by the State of Louisiana to lay an excise tax on the privilege of engaging in interstate commerce and upon the carrying on of a business in interstate commerce; that the tax statute is arbitrary and discriminatory in violation of the Fourteenth Amendment; that the taxing statute, therefore, is not valid.

## STATEMENT OF THE CASE

There is but one issue of law here—, whether state taxation may discriminate against the multi-state business operation. But it arises upon two different sets of operative facts.\*

### First: "The Labor and Shop Overhead Phase"

In its shops at Duncan, Oklahoma, appellant Halliburton produces and fabricates complex truck-borne oil-well servicing equipment which it uses in Louisiana. See Photographs Annex 8 and Annex 9 to the original Petition (Record, 42-43). Halliburton uses this type of equipment in Louisiana, under contract, but does not sell the equipment. Halliburton is a producer using its own product, sometimes called a "manufacturer-user," or "producer-consumer."

When Halliburton brought the fabricated equipment into Louisiana, it paid a use tax upon the cost to it of the tangible

\* Initially there was a Third Phase to this case entitled "*The Cost v. Depreciated Value*" phase. That phase of the case is no longer at issue and appeal is not taken from the decision below, insofar as it relates to this third phase of the case.

physical properties incorporated into the equipment. Louisiana now demands, additionally, a 2% use tax upon the labor and shop overhead expended in assembling and producing the finished item.

If Halliburton had its shops in Louisiana, instead of in Oklahoma, a sales tax would fall upon its operations (i.e., the production and use of an item of equipment) as follows: (1) a sales tax would fall upon the purchase price of the truck chassis when it was purchased by Halliburton and (2) a sales tax would fall upon the purchase price of each item of physical equipment (e.g., motors, pipes, metal, gaskets, etc.) which was purchased by Halliburton for incorporation into the finished product item. But, of course, there would be no sales tax whatsoever, and no use tax whatsoever upon the "labor and shop overhead" which went into the assembly operation, which transformed the raw truck chassis and the other raw metal parts into the complex finished item. This is incontestible and uncontested.

The Collector has stipulated that his position is discriminatory:

"If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of the materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead." (Stipulation—Par. IV. Record, p. 58)

Nevertheless, says the Collector, because Halliburton has



its shops in Oklahoma, and not in Louisiana, an additional 2% tax must be paid. Because Halliburton operates its construction shops in Oklahoma and not in Louisiana, the Collector would demand a penalty excise tax measured by 2% of the "labor and shop overhead" expended by Halliburton, in its Duncan, Oklahoma, shops.

### **The Collector's Ruling:**

The Collector has accorded his discriminatory position the status of a regulation in an open letter, directed to Commerce Clearing House Tax Service, under date of October 10, 1956, reported in CCH Louisiana State Tax Service, Par. 200-115, viz.,

"(§ 200-115) Letter from Legal Division, Department of Revenue, October 10, 1956.

### **"Sales and use tax—Cost basis of direct labor and overhead charges.**

"The cost basis with regard to direct labor and overhead charges where supply items are purchased at retail outside of Louisiana and manufactured, fabricated and assembled **outside of Louisiana** into a finished product which is brought into the state for use solely by the fabricator is the cost to the fabricator of putting the finished product down in Louisiana. This cost includes all cost of acquiring the materials, fabrication and assembly, labor overhead, transportation and other incidental costs.

"See § 60-101-a.

### **Question submitted by CCH.**

"What is the cost basis for Louisiana Sales or Use Tax

purposes with regard to direct labor and overhead charges where supply items are purchased at retail **outside of Louisiana** and manufactured, fabricated and assembled **outside of Louisiana** into a finished product which is brought into Louisiana for use solely by the fabricator and not manufactured, held or offered for resale?

**Answer** [By the Collector]

"Louisiana Revised Statutes of 1950, Title 47, Section 302, levies a tax upon the use of each item of tangible personal property in the State at the rate of two per centum (2%) of the 'cost price' of each such item.

" 'Cost price', according to Section 301 of Title 47, Louisiana Revised Statutes of 1950 'means the **actual cost** of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, **labor or service cost, transportation charges** or any other expenses whatsoever.' "

"In accordance with these provisions of the law, the basis for the Use Tax in Louisiana, under the circumstances enumerated in your question, is the cost to the fabricator of putting the finished product down in Louisiana. **This cost would include all costs** of acquiring the materials used, fabrication and assembly, **labor, overhead, transportation, and any other costs incident thereto.\***

### **The Unconstitutionality:**

The Use Tax is fixed at 2% of "cost price" (Sec. 302(A) (2)† and "cost price" is defined as including "labor" (Sec.

\* Note that the Collector would tax the very "transportation" which brings the chattel up to the Louisiana line.

† See Appendix "B," *infra*, p. 69.

301(3).<sup>3</sup> The Collector (sustained by the Louisiana Supreme Court) therefore includes labor and shop overhead in the base of the "Use Tax," while excluding it from the base of the "Sales Tax." Thus, the discrimination against the transaction which involves the interstate movement.

Obviously, the Collector would tax the Labor and Shop Overhead for the sole and only reason that it took place outside Louisiana. Halliburton contends that this is discrimination of the clearest and most elementary type.

Halliburton concedes that (as an out-of-state "manufacturer-user") it brings these complex and vastly useful pieces of equipment into Louisiana, where they serve the Louisiana oil producers. And, Halliburton is quite willing to pay to the State of Louisiana a Use Tax in exactly the same sum as the Sales Tax would be, upon a comparable operation (by an intra-state "manufacturer-user") in Louisiana. But, says Halliburton, "No penalty should be levied upon us merely because we have our shops in Oklahoma and not in Louisiana." And Halliburton adds, "There should be no collection of toll at the Louisiana State line."

It is unequivocally clear that, if Halliburton operated entirely in Louisiana, and had its shops in Louisiana, there would be neither any sales tax, nor any use tax, upon the "labor and shop overhead" element which it put into its finished products. Halliburton respectfully submits that there should be no increase in its Louisiana tax burden, simply because it first creates its products in Oklahoma, and then

<sup>3</sup> Note the statutory disavowal of intent to tax interstate commerce. Sec. 305, at p. 83, *infra*.

moves them across the state line into Louisiana, where it uses them to serve Louisiana oil operators.\*

Halliburton contends that such a tax, based solely upon the movement of goods in interstate commerce, is discriminatory and is an unconstitutional burden upon interstate commerce.

### Second: "The Isolated Sales Phase"

The Louisiana Sales Tax Statute (R.S. 47:301(10)) provides specifically that:

"... nor [shall the terms 'sale at retail'] include an isolated or occasional sale of tangible personal property by a person not engaged in such business."

The Louisiana Department of Revenue Sales Tax Regulations provide:

#### "Art. 2-33 Casual and Isolated Sales—

"The tax does not apply to casual and isolated sales by persons not engaged in the business of selling such tangible personal property. . . ."

It is clear, therefore, that a "casual and isolated sale, by a person not engaged in the business of selling . . ." the type of property at issue, is completely exempted from the Louisiana Sales Tax. This is uncontested.

The Collector of Revenue contends, and the Louisiana

\* Suppose, hypothetically, that Oklahoma had a sales tax. The Louisiana statute would credit Halliburton with the 2% tax paid to Oklahoma upon the tangible physical properties incorporated in the finished items of equipment. (Sec. 305, *infra*, p. 83.) Louisiana would still demand a 2% use tax on the labor and shop overhead expended in assembling the finished item. This intangible element of "cost price" would be taxed (by Louisiana) if incurred in Oklahoma. It would not be taxed if incurred in Louisiana. Q. E. D.

Court has held, that the Louisiana statute and regulations cannot be construed to grant a comparable "isolated sales" exemption in the case of the use tax. The Collector concedes that an "isolated or casual" sale made in Louisiana is exempted from the Louisiana sales tax. The Collector contends, however, that the use tax, as levied by the taxing statute, properly falls upon the use, in Louisiana, of property which was acquired through an "isolated or casual sale" made in another state.

The issue is squarely raised here. Halliburton purchased certain oil field equipment from Spartan Tool and Service Company of Houston, Texas, when that concern went out of business. And it purchased an airplane from the "Western Newspaper Union, of New York." It is stipulated that neither of these vendors was in the business of selling such equipment. It is stipulated that such sales were "casual, occasional and isolated sales. . . ." (Stipulation of Facts, Par. VI. R. 60-61).

It is completely clear that if these "isolated sales" transactions had taken place within the borders of Louisiana, no sales tax would have fallen upon the transaction. Nor would any use tax have been incurred by anybody. This is stipulated.

We quote from the Stipulation of Facts:

"It is further stipulated that the entire . . . [purchase price] . . . would not have been subject to the Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made within the State of Louisiana." (Tr. 61)

The Collector's position, therefore, is that because these isolated sales occurred outside of Louisiana, the taxpayer must pay a two per cent "use" tax, that would not fall upon the

use of the properties if the transactions had occurred in Louisiana. It is clear that this use tax is demanded by the Collector solely because the isolated sales transactions occurred outside Louisiana and the goods thereafter were brought across the state line. Thus, the Collector concedes that, but for this element of interstate transportation, he would not be demanding this tax money at all.

Suppose Halliburton had taken delivery of the newspaper company's airplane at the Moisant Airport, in New Orleans, so that the sale was a Louisiana transaction. Obviously—no sales tax on this “isolated sale transaction.” In the present case, the state demands the 2% use tax solely because the “isolated sale transactions” took place outside Louisiana and, thereafter, the airplane, etc., were transported, in interstate commerce, across the Louisiana state border line.

The taxpayer's contention that this discriminatory result is unconstitutional is precisely upheld in *State v. Bay Towing and Dredging Company, Inc.*, 265 Ala. 282, 90 So. 2d 743 (Alabama, S. Ct., 1956). See discussion, *infra*, p. 32.

### **How Federal Questions Were Presented:**

There is no issue in this case other than whether or not the Louisiana taxing statute, as construed by the Louisiana Collector and the Louisiana Supreme Court, is offensive to the Federal Constitution. The issue was raised in the initial pleadings filed, and throughout all phases of the case.

The following is quoted from the original petition\* filed by Halliburton:

\* The initial pleading, R. 10, et seq.

## "XI.

"As to each of the aforesaid three phases of this case, the taxpayer alleges—inter alia—that the Use Tax, if interpreted and applied as the Collector would interpret and apply it here would cast upon the taxpayer (petitioner) a burden more onerous than that which would be levied by the Louisiana Sales and Use Tax had the transactions involved occurred in Louisiana; that a state Use Tax may be upheld as reasonable, legal, and constitutional only insofar as the burden thereof is equal to, and not in excess of the burden of the Sales Tax of that same state, to which Sales Tax said Use Tax is complementary. And the taxpayer further alleges that:

"A. The assessment proposed by the Collector, insofar as it results in a greater use tax liability than would be imposed under the sales tax if the transactions had taken place in Louisiana, is contrary to the terms and wording of the Louisiana taxing statute, as well as contrary to the intent and purposes of the Louisiana Legislature in enacting the taxing statute; and

"B. The practical effect of the Collector's proposed assessment is to subject goods moving [in] interstate commerce to a greater tax liability than would be imposed in the same situation, if all of the operative facts had occurred within the State of Louisiana, and therefore, the taxing statute (if interpreted and applied as the Collector would interpret and apply it here) would amount to a discrimination against interstate commerce prohibited by the Commerce Clause of the United States Constitution; and

"C. The interpretation and application of the Louisiana Use Tax Statute, as proposed here by the



Collector, is so unreasonable, arbitrary and capricious, and is so without regard to the true facts, and the economic realities of the factual situations, as to amount to a denial of due process of law within the meaning of the 'due process' clause of the United States Constitution.

### "XII.

"Regulation of interstate commerce is a function explicitly reserved to the Congress of the United States by virtue of the Constitution of the United States and particularly Article I, Section 8, Clause 3 thereof, and the tax here demanded and contended for by the Collector of Revenue of Louisiana directly infringes on that right of regulation vested in the Federal Congress, for the reason, among others, that [it] is an attempt by the State of Louisiana to lay a tax on the privilege of engaging in interstate commerce and upon the carrying on of the business of interstate commerce.

### "XIII.

"Petitioner alleges that it would be deprived of its property without due process of law contrary to the protection and guaranty granted under the Constitution of the United States and particularly under the Fourteenth Amendment thereof and under Article I, Section 2, of the Constitution of the State of Louisiana should it be required to pay said taxes and the refund herein claimed be denied to it."

That the federal constitutional issue was at issue throughout the case is made plain by the following language from opinion of the Louisiana Supreme Court:

"Halliburton brought suit for a return of the amount

in dispute, supra, alleging that the Use Tax, if interpreted and applied as the Collector would interpret and apply it to Halliburton, would cast upon the taxpayer (Halliburton) a burden more onerous than that which would be levied by the Louisiana Sales and Use Tax had the transactions involved occurred in Louisiana; and, that a state Use Tax may be upheld as reasonable, legal and constitutional, only insofar as the burden thereof is equal to and not in excess of the burden of the Sales Tax of that same state, to which Sales Tax said Use Tax is complementary. Plaintiff further alleged that the tax demanded of it infringed upon the right of regulation of interstate commerce by Congress (Article I, Section 8, Clause 3, Constitution of the United States), in that it was an attempt by the State of Louisiana to lay a tax on the privilege of engaging in interstate commerce and upon the carrying on of the business of interstate commerce. It still further alleged that it would be deprived of its property without due process of law, contrary to the protection and guaranty granted under the Constitution of the United States and particularly under the Fourteenth Amendment thereof and under Article I, Section 2, of the Constitution of the State of Louisiana, should it be required to pay the tax assessed.

"The trial court agreed with plaintiff and rendered judgment in its favor after trial. . . ."

"We conclude that under the rulings of the above authorities the 'use tax' as applied to plaintiff does not infringe upon the regulation of interstate commerce by Congress."

"Plaintiff endeavors to set forth the alleged inequality of the use tax as applied to it by arguing that if a

local oil well servicing company had manufactured its own equipment in Louisiana it would only have had to pay a sales tax on the component parts employed, whereas plaintiff has been assessed a use tax not only on the component parts but also on the cost of labor and shop overhead. Plaintiff argues, as set forth, supra, that its burden, as compared to that of a local taxpayer, is so unequal as to constitute a violation of the 14th Amendment to the United States Constitution and of Article I, Section 2, of the Constitution of Louisiana."

"What does "equal protection of the laws" mean as applied to taxation? Equal protection cannot be said to be denied by a statute which operates alike on all persons and property similarly situated, or by proceedings for the assessment and collection of taxes which follow the course customarily pursued in the state."

"We do not find that the Louisiana Use Tax treats any person differently from any other person in a like circumstance. All users are subjected to the same rate of tax; there is no arbitrary or unreasonable distinction. The law contains no hostility nor discrimination; it singles out no class of persons as subjects for its assessment.

"We do not find that the use tax as herein applied imposes an unconstitutional burden on plaintiff."

"... plaintiff relies on the case of *State of Alabama v. Bay Towing & Dredging Company, Inc.*, 90 So. 2d 743, wherein the Supreme Court of Alabama stated:

"As we see it, if the use tax act is construed as

imposing a tax on the use in this state of tangible personal property purchased outside the state in casual and isolated sales transactions, such tax would constitute an unlawful discrimination against interstate commerce, contrary to the Commerce Clause of the United States Constitution, Const. art. 1, sec. 8, cl. 3, since no similar or equivalent tax burden is imposed in connection with the purchase of such property in casual and isolated sales transactions within the state. . . .

"We might say at the outset that we do not feel constrained to follow the Alabama case, *supra*, because we find that the instant matter does not involve a question of interstate commerce."

"... we find no discrimination nor deprivation of property without due process of law. . . ." (Record, at pp. 121, 128, 129, 130, 132, and 133)

Thus the federal constitutional issues relating to

1. The Interstate Commerce Clause;
2. The Due Process Clause; and
3. The Equal Protection of the Laws Clause

were sole questions in this case. Those questions were squarely raised in the original pleadings and were actively at issue throughout. The trial court held that the Louisiana tax statute was invalid, as offensive to the United States Constitution under all three clauses, and granted the refund sought (\$43,325.63). The Louisiana Supreme Court reversed and upheld the Louisiana tax statute as valid, finding that it does not

offend any constitutional rights of the taxpayer. From this latter ruling, Halliburton has appealed to this Court.

## THE QUESTIONS ARE SUBSTANTIAL

### The Law:

In the landmark decision in the *Northwestern States Portland Cement Company* case (1959)\* this Court held that a state may levy a **non-discriminatory** net income tax upon concerns who had theretofore claimed exemption therefrom under the Interstate Commerce clause of the Federal Constitution.

In zealous exercise of its new found freedom to tax the interstate operator, Louisiana now asserts its right to levy an excise tax upon an interstate operation which is heavier and more burdensome than the same tax would be upon the identical operation if it were conducted wholly within the state border lines. Louisiana frankly asserts that it may discriminate against the interstate business and tax it more heavily than its purely intrastate competitor.

Your Honors did not authorize such discrimination. In the *Portland Cement Company* case, this Court said:

"From the quagmire [of prior decisions] there emerge, however, some firm peaks of decision which remain unquestioned.

"It has long been established doctrine that the **Commerce Clause** gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the

\* *Northwestern States Portland Cement Company v. Minnesota*, and *Williams v. Stockham Valves & Fittings, Inc.*, 358 U. S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421, 67 ALR 2d 1292, (1959).

subject in the area of taxation nevertheless **requires that interstate commerce shall be free from any direct restrictions or impositions by the States.** *Gibbons v. Ogden*, (US) 9 Wheat 1, 6 L ed 23 (1824). In keeping therewith a State 'cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose' such as itinerant drummers. *Robbins v. Shelby County Taxing Dist.* 120 US 489, 493, 494, 30 L ed 694, 696, 7 S. Ct. 592 (1887). Moreover, **it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce,** *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 95 L ed 573, 71 S. Ct. 508 (1951). Nor may a State impose a tax which **discriminates against interstate commerce either by providing a direct commercial advantage to local business,** *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 96 L ed 436, 72 S. Ct. 424 (1952); *Nippert v. Richmond*, 327 U. S. 416, 90 L ed 760, 66 S. Ct. 586, 162 ALR 844 (1946), or by subjecting interstate commerce to the burden of 'multiple taxation,' *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 98 L ed 583, 74 S. Ct. 396 (1954); *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L ed 1365, 58 S. Ct. 913, 117 ALR 429 (1938). Such impositions have been stricken because **the States, under the Commerce Clause, are not allowed 'one single-tax worth of direct interference with the free flow of commerce.'** *Freeman v. Hewitt*, 329 U. S. 249, 256, 91 L ed 265, 274, 67 St. Ct. 274 (1946)." (at p. 427, *Emphasis supplied*)

Appellant submits that Louisiana is here levying an excise tax upon the "privilege of engaging in interstate commerce." Appellant submits that the tax here at issue clearly "discriminates against interstate commerce . . . by providing a direct commercial advantage to local business"; that the Louisiana Collector's position is an open flaunting of the prohibitory language of decision above quoted.

### **The Discrimination:**

The Louisiana Collector has stipulated that he would discriminate. He demands the use tax from Halliburton (to the extent of some \$40,000) while stipulating frankly that, if Halliburton conducted its entire operation in Louisiana (instead of partially in other states and partially in Louisiana), he would not be demanding any tax money at all.

We quote from the Collector's stipulations relating to both phases of this case:

#### **First: The Labor and Shop Overhead Phase—**

**"If Halliburton had . . . operated . . . at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on materials purchased outside Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead." (R. 58)**

#### **Second: The Isolated Sale Phase—**

**" . . . the entire . . . [purchase price] would not have been subject to the Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made within the State of Louisiana." (R. 61)**

The Collector stipulates that, if this were a purely Louisiana (intrastate) operation, the excise tax would not be demanded. Yet he demands it in this case. And the Louisiana Supreme Court has held that the added element of interstate activity and interstate transportation properly gives rise to the additional tax. Louisiana frankly discriminates against inter-



state commerce "... by providing a direct commercial advantage to local business. . . ."

### **The Decision of the Louisiana Supreme Court—\***

Halliburton submits that the situation here is of surpassing simplicity and clearness, viz.,

- I. It is the law that a state may not, by its taxes discriminate against interstate commerce by providing a direct commercial advantage to local business. *Portland Cement* case, supra.
- II. The Collector had stipulated that the excise tax he demands here would not be due "... if Halliburton . . . operated at a location within the State of Louisiana."

How, then, could the Supreme Court of Louisiana possibly conclude that the tax does not discriminate against, and burden, interstate commerce? How could it conclude that no "direct commercial advantage" is given to the purely local operator?

It is difficult to get at the heart of the Louisiana decision. Its language strikes only glancing blows at the problem.

First, the Court points out that the Collector would treat the use tax as if it were a property tax. We quote:

"The Collector urges that the district court erred in not finding that the incidence of the Louisiana Use Tax is non-discriminatory; that it is equal in its application because it is upon the use of tangible personal property after it has been withdrawn from commerce; that the

\* Reproduced as Appendix "A," p. 49, infra.

combined effect and purpose of the Sales Tax and Use Tax is to insure that all tangible personal property used or consumed in the State of Louisiana bears a 2% tax, either at the time of its original sale at retail in the state or at the time of its first use in the state if a 2% sales tax has not already been paid by the user to any other state."

Of course, it is settled that the use tax is not a "property tax." It is an excise tax upon the privilege of using.\* The Louisiana Supreme Court concedes this and quotes from the *Henneford* case,

"The [use] tax is not upon operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, **non-discriminatory in its operation**, when they have become part of the common mass of property within the state of destination.

"For like reasons they may be subjected, when once they are at rest, to a **non-discriminatory** tax upon use or enjoyment.

"A **non-discriminatory** tax upon local sales . . . has never been regarded as imposing a direct burden upon interstate commerce. . . ." (127 So. 2d, at p. 508)

\* Even if a "property tax" approach could be fairly adopted, this would not eliminate the open "discrimination." The **property tax** would be greater, if the labor and shop overhead element of "cost" were incurred outside Louisiana, than it would be if the construction and assembly work were done in Louisiana.

Then the Louisiana Court (ignoring the matter of "discrimination") said:

"We conclude that . . . the use tax as applied to the plaintiff [Halliburton] does not infringe upon the regulation of interstate commerce by Congress. The taxed matter had definitely come to rest in Louisiana and had acquired a situs in the State." (at pp. 508-509)

Next, addressing itself to the question of discrimination, the Louisiana Court said:

"Plaintiff endeavors to set forth the alleged inequality of the use tax as applied to it by arguing that if a local oil well servicing company had manufactured its own equipment in Louisiana it would only have had to pay a sales tax on the component parts employed, whereas plaintiff has been assessed a use tax not only on the component parts but also on the cost of labor and shop overhead. Plaintiff argues, as set forth, supra, that its burden, as compared to that of a local taxpayer, is so unequal as to constitute a violation of the 14th Amendment to the United States Constitution and of Article I, Section 2, of the Constitution of Louisiana." (at p. 509)

Then the Louisiana opinion quotes Cooley on Taxation, viz.,

"What does 'equal protection of the laws' mean as applied to taxation? Equal protection cannot be said to be denied by a statute which operates alike on all persons and property similarly situated, or by proceedings for the assessment and collection of taxes which follow the course customarily pursued in the state.'" (at p. 509)

Finally the Louisiana Supreme Court simply concludes that the Louisiana tax (although it falls more heavily upon

the interstate operator) is not "discriminatory" because the discrimination is only "incidental"! The Court put it this way:

"We do not find that the Louisiana Use Tax treats any person differently from any other person in a like circumstance. All users are subjected to the same rate of tax; there is no arbitrary or unreasonable distinction. The law contains no hostility nor discrimination; it singles out no class of persons as subjects for its assessment.

"We do not find that the use tax as herein applied imposes an unconstitutional burden on plaintiff. Plaintiff's comparison, *supra*, is not apposite. There must be an incidence of taxation; there must be an occurrence which brings the use tax into effect. In order to have an imposition of a sales tax, there must be a sale. Likewise, to have a levy of a use tax, property must come to rest in the State after leaving interstate commerce, and there must be a user of the property in the State. In the instant case, the fabricated product was transported to, came to rest in, became part of the common mass of property in, and was used in Louisiana. The proper comparison would be between the use tax on the assembled equipment and a sales tax on the same equipment if it were sold. What takes place before the fabricated product leaves interstate commerce and enters the State of Louisiana to rest is not within the contemplation of the statute except for the determination of cost price. **Labor and shop overhead are considered incidentally together with other items as a basis for arriving at cost.**" (at p. 510)

With reference to whether or not the 2% use tax can be put upon the Labor and Shop Overhead element of cost (which is the only issue in this phase of the case), the Court thus concludes:

"What takes place before the fabricated product leaves

interstate commerce . . . is not within the contemplation of the statute **EXCEPT** for the determination of cost price.

"Labor and shop overhead are considered **incidentally** together with other items as a basis for arriving at cost." (at p. 510)\*

Of course, the only issue at all here is whether or not it is discriminatory to include the labor and shop overhead (whether "incidentally" or otherwise), in the "determination of cost price," for purposes of the use tax calculation. It is the "determination of cost price" which fixes the tax.

The Louisiana court does not, and cannot, come to the point and say "We **include** the labor and shop overhead in the tax base for interstate operators. We **exclude** the labor and shop overhead from the tax base for local (intrastate) operators. Yet this is not discrimination. We give no direct commercial advantage to local business as prohibited by the federal constitution."

Since the Louisiana court cannot face-up to the issue without such a resulting absurdity, the Court sideswipes the issue and says that:

"What takes place . . . [in] interstate commerce is not [considered] . . .

" . . . **EXCEPT** for the determination of cost price . . .

"Labor and shop overhead are considered [only] incidentally . . . ."

What Halliburton precisely complains of is the **inclusion** of an item (labor and shop overhead) in the tax base (in the

\* Infra, pp. 64-65

"determination of cost price") where there is a multi-state transaction, where as the same item (labor and shop overhead) is—incidentally—**excluded** from the tax base in the purely intra-Louisiana situation.

Specifically, Halliburton says that Louisiana is here demanding \$40,000 in tax moneys while, simultaneously, stipulating that

"If Halliburton had . . . operated . . . at a location within Louisiana . . .

"there would have been no . . . tax . . . ." (R. 58)

Let us suppose that Halliburton set up its construction shops in Texas, immediately adjacent to the Louisiana state line. And, let us suppose that a competitor of Halliburton (in exactly the same business) set up its shops just inside the Louisiana line, with a white-washed fence along the state line separating the two operations. When the Louisiana operator produced and used his equipment in Louisiana (a purely intra-state operation), there would be no tax on the labor and shop overhead element of cost. See stipulations. But for each piece of equipment which Halliburton produced on the Texas side (and then brought into Louisiana across that white-washed fence line), Louisiana would demand the two-per-cent tax on the labor-and-shop overhead element of the cost. The two operations would be identical, but—says Louisiana—the movement of the equipment across that state line is enough to give rise to the additional two-per-cent tax. This is the Louisiana Collector's avowed position.\*

\* Note the 2% inducement to establish the production shops in Louisiana.

With reference to the "Isolated Sale Phase," the Collector has similarly stipulated that, but for the element of interstate transportation, he would not be demanding the tax. The stipulation is that

"... the entire ... [purchase price] ... would not have been subject to the Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made in Louisiana." (R. 61)

If Halliburton had bought the casually purchased airplane at Moisant Airport, in New Orleans, so that the sale was a Louisiana transaction, it is stipulated that there would be no two-per-cent tax under the Louisiana Sales and Use Tax. Yet, because Halliburton purchased the airplane in New York and then flew it into Louisiana, the two-per-cent tax (under the same statute) is demanded. Clearly, it is only the element of interstate transportation which differentiates the two factual situations.

Yet the Louisiana Court brusquely disposes of this phase of the case by stating:

"... we do not feel constrained to follow the *Alabama* case ... because we find that the instant matter does not involve a question of interstate commerce." (R. 132)

"... we find no discrimination nor deprivation of property without due process of law." (R. 133)

Nevertheless, the fact remains that Louisiana demands that Halliburton pay \$40,000 in taxes while stipulating that Halliburton would not have to pay the tax "... if Halliburton



had . . . operated . . . at a location within the State of Louisiana," (R. 58) and the transaction would be " . . . not subject to . . . tax had the purchase been made in Louisiana." (R. 61)

### **The Conflicting Decision in Alabama—**

In *State v. Bay Towing & Dredging Company, Inc.*, 265 Ala. 282, 90 So. 2d 743 (1956), the Supreme Court of Alabama considered an "isolated sale" case exactly like the present case, except that the property involved in the "isolated sale" consisted of five barges.

The doctrine of the *Bay Towing* case is summarized in its syllabi, from which we quote:

#### **Syl. 3. Commerce Key 63**

"If state use tax is construed as imposing a tax on use in the state of tangible personal property purchased outside the state in casual and isolated sales transactions, such tax would constitute an unlawful discrimination against interstate commerce, contrary to commerce clause of the United States Constitution, in view of the fact no similar or equivalent tax burden is imposed in isolated sales transactions within the state. Code 1940, Tit. 51, § 788; U.S.C.A. Const. art. 1, § 8, Cl. 3." (90 So. 2d at p. 743)

#### **Syl. 4. Commerce, Key 63**

"If a state use tax integrated with a sales tax places a discriminatory burden upon transactions in interstate commerce, and such burden would not apply to local sales, use tax would become unconstitutional in its operation as violative of commerce clause of Federal Constitution. Code 1940, Tit. 51, Sec. 753, 788. U.S.C.A. Const. art. 1, Sec. 8, cl. 3."

In striking down the Alabama use tax, the Alabama Supreme Court said:

"The position taken by the state is that § 788, Tit. 51, as amended, supra, requires that the tax be paid on tangible personal property purchased outside of the state and brought within the state for storage, use or consumption whether the seller of such property is engaged in the business of dealing in such property or not; that the wording of Section 788 shows such to be the clear legislative purpose. On the other hand, **Bay Company's insistence is that the sales tax and the use tax are complementary, one to the other; that the two laws must be construed together as one integrated, cohesive system of taxation; that unless property would be subject to the sales tax, had the sale occurred within this state, then the use tax cannot apply when the sale occurs without the state; that the property here involved would not be subject to the sales tax had the sale taken place here, and hence is not subject to the use tax. The trial court sustained Bay Company's contention, in which we concur.**

"(1,2) While the sales tax is levied on the transaction of sale itself and the use tax on the use of property after the sale is completed, it seems clear that the legislature intended that these two tax laws be considered together as embodying **one integrated, cohesive system of taxation.** We have held them to be **complementary, one to the other,** and that the two acts should be construed in pari materia. *State v. Advertiser Co.*, 257 Ala. 423, 59 So. 2d 576; *Paramount-Richards Theatres v. State*, 256 Ala. 515, 55 So. 2d 812; *State v. Southern Kraft Corp.*, 243 Ala. 223, 8 So. 2d 886; *Layne Central Co. v. Curry*, 243 Ala. 165, 8 So. 2d 839. The purpose and effect of the two laws is thus succinctly stated in *Paramount-Richards Theatres v. State*, supra (256 Ala. 515, 55 So. 2d 820):

"The measure of the tax under the Sales Tax Act is the retail sales price of the goods; and under the Use Tax Act the measure of the tax is likewise the retail sales price of the goods.

"The intent and result of this legislation is to impose a sales tax on sales which occur within the state, and a use tax (so called) measured by the retail sale price of goods purchased outside the state for use within the state. **For these reasons these two acts are referred to as being complementary, one to the other. The Use Tax Act is referred to as a compensatory measure,** to equalize the burden of the sales tax and prevent avoidance of the tax by the purchase of goods in interstate commerce or from outside of the state. \* \* \*

"(3) As we see it, if the use tax is construed as imposing a tax on the use in this state of tangible personal property purchased outside the state in casual and isolated sales transactions, such tax would constitute an unlawful discrimination against interstate commerce, contrary to the Commerce Clause of the United States Constitution, Const. art. 1, § 8, cl. 3, since no similar or equivalent tax burden is imposed in connection with the purchase of such property in casual and isolated sales transactions within the state. This principle was recognized in *Paramount-Richards Theatres v. State*, supra, where it was said:

"If the legislature had imposed a rental tax only upon property shipped into the state in interstate commerce or purchased outside of the state, it would constitute a direct discrimination against interstate commerce, and such provision would therefore be invalid as being in conflict with the interstate commerce clause in the Constitution of the United States, art. 1, § 8, cl. 3. \* \* \*

"(4.5) The United States Supreme Court has held that a use tax, integrated with a sales tax, in a manner similar to ours, is **not violative** of the Commerce Clause **when such system of taxation does not discriminate against transactions in interstate commerce**, but merely equalizes the burden of taxation on purchases made in interstate commerce and on strictly local sales. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814. Cf. Annotation, 129 A.L.R. 222; Annotation, 153 A.L.R. 609; Note, 54 Colm.L.Rev. 261. **However, if such a system of taxation places a discriminatory burden on transactions in interstate commerce, which would not apply to local sales, the use tax would become unconstitutional in its operation.** *Paramount-Richards Theatres vs. State*, supra; *Anderson v. Mullaney*, 9 Cir., 191 F.2d 123, 129, affirmed 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458; *Best & Co. v. Maxwell*, 311 U.S. 454, 455, 61 S.Ct. 334, 85 L.Ed. 275; *Hale v. Bimco Trading Co.*, 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771. As said in *Best & Co. v. Maxwell*, supra (311 U.S. 454, 61 S.Ct. 335):

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. \* \* \*

"It seems clear to us that if the sales of the barges had taken place in Alabama there would be no sales tax due because the barges were purchased in 'casual' or 'isolated' sales transaction from concerns not engaged in the business of selling barges but engaged solely in the business of hauling for hire. Therefore, if the use tax act should be construed as imposing the tax on 'casual' and 'isolated' sales in interstate commerce there would result a clear discrimination against such sales." (90 So. 2d at pp. 746-747)

"... in the instant case if Bay Company had bought the barges in Alabama, there would be no sales tax due. Accordingly, if the use tax act should be construed as imposing a tax there would be, as a result, a clear discrimination against Bay Company's interstate sales transactions. . . ." (at p. 748)

### Conflicting Results in Other States:

The result in **North Dakota** and **Ohio** is in accord with the Alabama decision, and directly contrary to the Louisiana decision herein. Further, the Supreme Court of **California** has clearly indicated that it disagrees with the Louisiana decision.

Between pages 118 and 119 of the Louisiana Record filed in this Court, is a copy of Halliburton's (blue) brief filed in the Louisiana Supreme Court. At page 45, et seq., of that brief, the ruling of the **North Dakota** Tax Commissioner is quoted and discussed. That ruling precisely supports Halliburton's position on the "labor and shop overhead" phase of this case.\*

\* In his ruling of August 6, 1956, Counsel for the **North Dakota** Commissioner, said:

"If these amendments are construed so as to impose a use tax on the total cost of only those items fabricated or manufactured outside this state by a contractor for his use in this state but not on the total cost of similar items fabricated or manufactured in this state by the contractor from materials purchased outside the state, then I believe there is discrimination on the basis of origin of the finished product such as would be repugnant to the 'privileges and immunities' and 'equal protection' clauses of the fourteenth amendment to the Federal Constitution and to section 2 of Article 4 of the Federal Constitution relating to privileges and immunities of citizens of each state. See Ex Parte Smith, 100 Fla. 1, 128 So. 864, and cases cited therein, and 16A C.J.S. 226-227.

"Considering the serious constitutional considerations involved and

The similar conclusions of the **Ohio** Department of Taxation is discussed and quoted at p. 50, et seq., of that blue brief.<sup>†</sup>

The **California** decision in point is *Chicago Bridge & Iron Company v. Johnson*, 19 Cal. 2d 162, 119 P. 2d 945 (1941). There the California Use Tax was carefully construed to exclude the "labor and shop overhead" element from the use tax base and, having so construed it, the California Supreme Court then found that (in view of such exclusion) the California Use Tax did not offend the federal "interstate commerce clause." The California decision is quoted and discussed at pp. 52-53 of the (blue) brief filed in the Louisiana Supreme Court.

At pp. 30-34 of the (blue) brief, Halliburton quotes pertinent language from Hartman, *State Taxation of Interstate*

the legislative purpose of providing a single comprehensive plan of taxation through a retail sales use tax law, it is my conclusion that 'total cost' as used in the 1955 amendment to subsection 5 of section 57-4001 **should be construed to mean only the cost of materials** used in fabricating, compounding, or manufacturing tangible personal property by a person for storage, use, or consumption **by that person**.

<sup>†</sup>The Ohio Department of Taxation issued Circular No. 18 dated March 1, 1954, CCH Ohio State Reporter, paragraph 60-37170, which states the position of the Ohio Department of Taxation to be as follows:

**"70 Tax base for producer-consumer"**

"In the case of consumer who produces the tangible personal property used by him, the tax base is the usual and ordinary consideration paid for such taxable property.

"It is the position of the Department that the 'usual and ordinary consideration paid shall be construed to mean the cost of the raw material' to the producer-consumer so as to place such a person in the same category under both the sales and use tax laws and avoid the discrimination that would otherwise exist as to a non-resident producer-consumer."

"\* Hereinabove, we have pointed out that Halliburton is obviously a 'manufacturer-user,' or 'producer-consumer.'"

*Commerce.* We respectfully refer this Court to those enlightening quotations. Of particular interest is the following quotation from Hartman:

"While the compensating use tax has been uniformly cleared of any discriminatory effects, in reaching that conclusion the Court has made an assumption that may be open to some question from an economic standpoint. An assumption by the Court that the tax burden on the consumers of locally bought goods is at least equal to the use tax burden on purchasers of out-of-state goods seems necessarily implicit in the finding that the compensating use tax does not discriminate against interstate commerce. **For, only if there is an equivalency of tax burden on the two types of purchases can it be said that the purchasers of out-of-state goods are not discriminated against.** (Emphasis supplied) at p. 167.

### **Louisiana Plans Further Discrimination;**

Louisiana Act 51 of 1959\* amended the Sales Tax act to exempt from the sales tax materials and supplies going into vessels "built in Louisiana shipyards," as well as the gross sales prices of such vessels when sold by the builders thereof.

The Louisiana Collector of Revenue would discriminate, however, against a vessel built outside Louisiana, and then brought into Louisiana across the state line. He asserts that as to such a vessel, moved in interstate commerce, Louisiana has the right to collect a use tax measured by the full construction cost price of the vessel. Of course, this is a forthright attempt to give Louisiana shipbuilders a commercial advantage over competitive shipyards in other states.

\* La. R.S. of 1950, 47:305.1. *Infra*, p. 84.



At the Tulane Institute of Mineral and Tidelands Law, Nov. 14, 1959, Mr. Charles D. Marshall of the New Orleans bar summarized the situation:

"APPLICATION OF THE LOUISIANA USE TAX TO PROPERTY  
ACQUIRED IN OTHER STATES

"The original justification for the use tax was the necessary protection of the state and its commercial enterprises against out-of-state purchasing to avoid the sales tax. Thus, the use tax has many times been said to be a complement of the sales tax. Constitutionality of the use tax was sustained by the United States Supreme Court on that basis. In *Henneford v. Silas Mason Co.*, that Court said:

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists. . . ."

"While it is difficult to form a logical pattern out of all the decisions of the United States Supreme Court, there is one thought which has been expressed again and again in those decisions, and that is that **a state cannot by its tax laws discriminate against interstate commerce.**<sup>42</sup> If a state did not have a sales tax law at all, but imposed only a use tax on property imported from another state, the discrimination against interstate commerce would be

\* Mr. Marshall's address is reproduced in XXXV Tulane Law Review 183.♢

<sup>42</sup> *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), and *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), are important illustrations.

too obvious for argument.<sup>43</sup> If, instead, such state did have a general sales tax law but exempted certain property when it was bought within the state while taxing the use of the same exempted property when it was bought outside the state, the principle is the same. The use tax would be discriminatory because of the unequal exemptions.

**"As a matter of principle, then, the use tax can never be any broader in its application to property imported into Louisiana than would the sales tax be if the property were purchased here in the first place.** The regulations under the Louisiana sales tax seem to agree: they contain a general statement that the use tax applies only where the sales tax would apply if the property had been sold in this state.<sup>44</sup> The Louisiana Supreme Court has used broad language to the same effect.<sup>45</sup> There are strong implications in the law itself to that end.<sup>46</sup> Nevertheless, the Department of Revenue is contending in at least two situations that the use tax is broader than the sales tax.

**"In the first situation, the Department maintains that even though, prior to the 1959 Statute, sales tax might not have been due upon the construction of a vessel in Louisiana, nevertheless, in the case of a vessel built outside Louisiana and brought into Louisiana, the state has the right to collect a use tax measured by the full construction price of the vessel.** The attorneys for the Department of Revenue advised that they have been suc-

<sup>43</sup> See *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952); *Walling v. Michigan*, 116 U.S. 446 (1886), for statements of the controlling principle.

<sup>44</sup> Regulations, art. 2-3.

<sup>45</sup> *Chrysler Corp. v. New Orleans*, 235 La. 123, 114 So.2d 579 (1959); *Fontenot v. S. E. W. Oil Corp.*, 232 La. 1011, 95 So.2d 638 (1957); *Mouldoux v. Maestri*, 197 La. 525, 2 So.2d 11 (1941).

<sup>46</sup> La. R.S. of 1950, 47:303, states that the importer shall pay a use tax "the same as if the said articles had been sold at retail for use or consumption in this state."

cessful in collecting substantial amounts of taxes under that approach. It is nevertheless the belief of the writer that the Department of Revenue cannot succeed in court with that approach, because, as a matter of statutory interpretation, the Louisiana use tax does not have a broader application than the sales tax, and further, even if it did, **the use tax would to that extent be a plain discrimination against interstate commerce.**

"The second instance in which the representatives of the Department of Revenue claim that the use tax is broader than the sales tax is with regard to the casual sales. In Louisiana, the sales tax does not apply to an isolated or occasional sale by a person not engaged in the business of making such sales.<sup>47</sup> However, the Department of Revenue maintains that there is no such thing as a 'casual use.' Thus, if one buys a drilling rig in Texas from a casual seller and takes delivery of it in Texas, the subsequent importation of the rig into Louisiana will result in a claim of use tax. Yet, if the sale had been made locally in Louisiana, where it would qualify as a casual sale for sales tax purposes, the Department would admit the transaction to be exempt. Discrimination against interstate commerce is evident in this position also.<sup>48</sup>

"In line with its attitude on these other issues, the Department of Revenue will, no doubt, try to collect use tax on vessels of fifty or more tons load displacement built outside Louisiana and imported into the state after enactment of Act 51 of 1959. It will be recalled that the 1959 Statute only extends its favors to vessels 'built in Louisiana.' As in the two instances discussed above, that requirement constitutes a discrimination against interstate commerce. The consequence is that the words 'built in

<sup>47</sup> La. R.S. of 1950, 47:301.

<sup>48</sup> *State v. Bay Towing & Dredging Co.*, 265 Ala. 282, 90 So.2d 743 (1956). Litigation on this issue is now pending in the Louisiana courts.

Louisiana' will have to be regarded as not written. Vessels built outside Louisiana must be entitled to the same privileges and exemptions as are the ones which have been built here. It may take litigation to settle the issue but the proper result seems reasonably clear.

"If it is correct that the materials used in repairs to vessels built in Louisiana are exempt, then, the provisions of the 1959 statute notwithstanding, the same exemption must, in order to avoid discrimination against interstate commerce, run in favor of vessels built outside Louisiana, provided, of course, such vessels are of the necessary qualifying size. Thus the requirement that the vessels be 'built in Louisiana' may have to be disregarded by the courts here also." (XXX *Tulane L. Rev.* at pp. 194, 195 and 198)

## CONCLUSION

Appellant taxpayer's position is simply this:

- I. The Use Tax falls upon the use of goods imported across state lines, i.e., upon transactions in interstate commerce.
- II. The Use Tax has been upheld, as constitutional, and as **not** a discriminatory burden upon interstate commerce, **SOLELY BECAUSE** (in the case then at issue) it **did not exceed the sales tax**, but was merely complementary to the sales tax and precisely equal to the sales tax, and—therefore—the use tax did not "discriminate" against the interstate transaction. *Henneford v. Silas Mason Company*, 300 U.S. 577, 81 L. Ed. 814, 57 S. Ct. 524.

III. Therefore, whenever the use tax (falling solely on interstate transactions) is more onerous than the sales tax (falling on comparable intrastate transactions) then the use tax loses the fiat of the *Henneford* decision, and is unconstitutional because it does discriminate against the transactions which are in interstate commerce.

The taxpayer, Halliburton, contends that, in any case where the burden of the use tax is more onerous than the sales tax (on the comparable intrastate transaction) would be, then the use tax—as so applied—is not supported by the *Henneford* decision, and the use tax statute is violative of the federal constitution.

If, "... the stranger from afar ..." is to bear a burden no heavier than that of "... the resident of Louisiana ..." (as the Collector concedes, and even argues), then the only comparison that can be made is to compare the burden which falls upon the taxpayers in the two cases, by asking three simple questions:

1. What is the tax burden upon the out-of-state taxpayer, the "stranger from afar"?
2. What is the tax burden upon the intra-state taxpayer, the Louisiana resident?
3. Are these two tax burdens equal?

The Collector has stipulated that Halliburton (or a competitor of Halliburton in the same line of endeavor) would

pay no sales or use tax if it set up its shops, and operated, in Louisiana. Yet the Collector demands a 2% use tax from Haliburton. How can the Collector seriously argue that this is equality of treatment? The answer is that he cannot.

Can the "compensating" USE TAX of a state, in any case, reach further or be more burdensome than the SALES TAX of that state, to which latter tax the Use Tax is supposed to be complementary? Can the burden of the Use Tax (falling upon an out-of-state "manufacturer-user") be heavier than the burden of the sales tax which would fall upon the comparable (and competing) intra-state "manufacturer-user"?

Suppose, in a given state, that the two-per-cent Sales Tax (which falls upon intra-state sales) were totally repealed, but that the two-per-cent Use Tax were retained, in such manner that it fell only upon the use of goods purchased outside the state and then imported across state lines. Would the Use Tax, in such a case be constitutional? We respectfully submit that it would not. The Use Tax (upon use of imported goods) was upheld by the United States Supreme Court in the *Henneford* case, *supra*, because (and only "because") it was a compensatory and complementary tax, coextensive and coterminous, with the Sales Tax of the same state. If the Sales Tax were totally repealed, then there would be no support for the Use Tax (solely levied on imported goods). The *Henneford* doctrine would not apply. The Use Tax (upon use of imported goods) could not stand alone, in the absence of a similar and coextensive Sales Tax upon the comparable intra-state situation.

Suppose, again, that the Sales tax were partially repealed. Suppose, for example, that the Louisiana Sales Tax statute

was amended to exclude the sale of automobiles in Louisiana. And suppose, at the same time, that the law continued to levy a two-per-cent Use Tax, solely upon the use in Louisiana of automobiles purchased outside of the state, and then brought into the state, across the state line. Is it not obvious that this would discriminate, to the extent of the 2% tax, against interstate transactions, in favor of the comparable intra-state transactions? Is this not the type of "discrimination" which is forbidden by the Commerce Clause and by the Due Process Clause of the United States Constitution? Can a contrary argument be seriously advanced?

Suppose the Use Tax were increased to 3%,\* and the (intra-state) Sales Tax kept at 2%, would not this be unconstitutional discrimination?

Does it not follow, that in any and every case whatsoever (and particularly in the present case) where the burden of the Use Tax extends beyond that of the Sales Tax and where the Use Tax falls more heavily upon the interstate situation than the Sales Tax would fall upon the comparable intrastate situation, then the Use Tax, as so app'd, is unconstitutional and void, as violative of the Federal Constitution.

Where the Sales Tax ends, the Use Tax must end.

As the Supreme Court of Alabama said:

"(4.5) The United States Supreme Court has held that a use tax, integrated with a sales tax, in a manner similar to ours, is not violative of the Commerce Clause when such system of taxation does not discriminate against

\* Or, increased to 50%? Or, 100%?



transactions in interstate commerce, but merely equalizes the burden of taxation on purchases made in interstate commerce and on strictly local sales. . . . [citations] **However, if such a system of taxation places a discriminatory burden on transactions in interstate commerce, which would not apply to local sales, the use tax would become unconstitutional in its operation. . . . [citations]** As said in *Best & Co. v. Maxwell*, *supra* (311 U.S. 454, 61 S. Ct. 335):

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. \* \* \*"

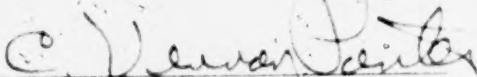
If the interstate **Use Tax** can exceed the intrastate **Sales Tax**, where is the line to be drawn? Could the Use Tax be fixed at 50% and the Sales Tax at 2%, thus creating a tax wall around the state?

In the present case the **Louisiana Collector** has stipulated that he would discriminate, and would tax only the "stranger from afar," while exempting Louisiana operators. We submit that the Federal Constitution forbids this.

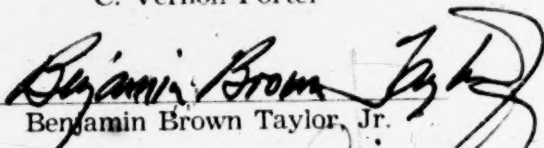
It is submitted that the position of the taxpayer, Halliburton, is completely sound; that all existing authority supports its position; that no authority to the contrary exists anywhere; that the Constitution of the United States strikes down the position of the Louisiana Collector, which is arbitrary and capricious, and violative of the commerce clause of the federal constitution and of the Fourteenth Amendment.

It is further submitted that the issues here are most substantial; that the federal questions are of nationwide importance; that this Court ought to give plenary consideration to this case to resolve the conflict of the Louisiana decision with that in Alabama, and with the results in North Dakota, Ohio and California; that the substantial federal question (whether a state may levy a discriminatory excise tax on interstate transactions) ought to be heard on its merits, upon brief and oral argument, and finally decided by this High Court.

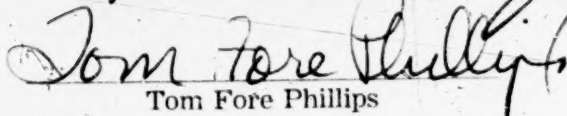
Respectfully submitted,



C. Vernon Porter



Benjamin Brown Taylor, Jr.



Tom Fore Phillips

*Attorneys for Appellant, Halliburton  
Oil Well Cementing Company*

%Taylor, Porter, Brooks, Fuller  
and Phillips,

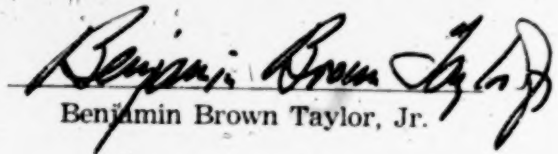
1100 La. National Bank Bldg.,

Baton Rouge, Louisiana.

Baton Rouge, Louisiana  
July 19, 1961

## PROOF OF SERVICE

I, Benjamin Brown Taylor, Jr., one of the Attorneys for Halliburton Oil Well Cementing Company, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of July, 1961, I served a copy of the foregoing Jurisdictional Statement, and its Appendices, on Roland Cocreham, Collector of Revenue of the State of Louisiana (and successor in office to James S. Reily and Robert L. Roland, earlier parties hereto), Appellee in connection with this Appeal, by delivering the same to his counsel of record, Mr. Chapman Sanford, at his office in the Capitol Annex Building, Baton Rouge, Louisiana.

  
Benjamin Brown Taylor, Jr.

## APPENDIX "A"

## OPINION OF THE

## Supreme Court of Louisiana

No. 44,934

HALLIBURTON OIL WELL CEMENTING COMPANY

-Appellant,

*versus*

JAMES S. REILY,

COLLECTOR OF REVENUE OF THE  
STATE OF LOUISIANA,

Appellee.

Rendered: February 15, 1961

Reported \_\_\_\_ La. \_\_\_\_, 127 So. 2d 502

Rehearing Denied March 20, 1961

*On Appeal from the Nineteenth Judicial District Court in and  
for the Parish of East Baton Rouge, State of Louisiana.  
Honorable Jess Johnson, Judge.*

HAMLIN, Justice.

The following two questions were presented for our determination on this appeal from a judgment rendered in favor of Halliburton Oil Well Cementing Company and against Robert L. Roland,<sup>1</sup> Collector of Revenue of the State of Lou-

<sup>1</sup> James S. Reily, originally named as defendant, was lawfully succeeded in office by Robert L. Roland, who was substituted as defendant on July 16, 1959.

isiana, in the sum of \$43,325.63, plus 2% interest from December 13, 1956, until paid:

(1) In the calculation of the Louisiana Use Tax (LSA-R, S 47:301 et seq.) assessed on equipment brought into the State of Louisiana from another state, should such tax be levied only on the component parts of the whole, where the owner himself fabricated and assembled the whole or finished product outside of the State of Louisiana, or should the tax be levied on the cost price of the finished fabricated product as set forth in the statute, supra, so as to include labor and shop overhead?

(2) Is machinery or equipment purchased in another state through the transactions of so-called isolated sales and later brought into the State of Louisiana for use subject to the Louisiana Use Tax?

Halliburton Oil Well Cementing Company (hereinafter referred to as Halliburton) is engaged in the business of servicing oil wells throughout the oil producing states of the United States, including Louisiana. Its principal place of business is maintained in Duncan, Oklahoma, and there it manufactures, assembles, installs, and builds up specialized oil well service units which it employs in its oil well service operations. Halliburton procures from various vendors throughout the United States raw materials, semi-finished, and finished articles necessary for the manufacture, assembly, installation, and build-up of well service units. When a well service unit has been completely processed at Duncan, Oklahoma, and has been tested for operation, it is assigned to one of Halliburton's various field camps in the United States, where it obtains a permanent situs unless transferred to another field camp loca-

tion where greater use may be made of it. A certain number of these units came to rest in Louisiana and obtained a permanent situs therein servicing oil wells located in Louisiana. Halliburton's books are kept in Oklahoma; they reflect the cost value of the units as comprising material cost, labor cost, and shop overhead.

In addition to the above units, Halliburton keeps in Louisiana certain cementing service units it purchased from the Spartan Tool and Service Company of Houston, Texas, when that company determined that it should no longer continue in the business of servicing oil wells, and an airplane purchased from the Western Newspaper Union of New York, which company is not regularly engaged in the business of selling airplanes.

For the years 1952, 1953, 1954, and 1955, Halliburton regularly filed with the State of Louisiana tax returns showing the amount of use tax money, as reflected by its calculations, due the State of Louisiana by it on service units employed in the State. Such amounts were paid to the State of Louisiana at the time of filing the statutory use tax returns.

On December 13, 1956, after lengthy correspondence and numerous conferences, Halliburton paid to the Collector of Revenue of the State of Louisiana (hereinafter referred to as Collector), under protest (LSA-R.S. 47:1576), a deficiency tax assessment of \$57,278.17, representing principal and interest, and also paid additional interest of \$142.83; it denied that \$43,189.27, plus a proportionate part of the additional interest, was due the State of Louisiana. By stipulation the deficiency tax assessment was allocated in the following manner:

<i>Phase</i>	<i>Principal</i>	<i>Interest</i>	<i>Total</i>
1. Labor and shop overhead .....	\$36,942.20	\$5,296.23	\$36,238.43
2. Cost price versus depreciated value .....	2,296.83	386.15	2,682.98
3. Isolated sales .....	3,789.20	615.02	4,404.22
Total amount in dispute	\$37,028.23	\$6,297.40	\$43,325.63
Amount not in dispute	12,063.03	2,032.34	14,095.37
Totals .....	\$49,091.26	\$8,329.74	\$57,421.00

Halliburton brought suit for a return of the amount in dispute, *supra*, alleging that the Use Tax, if interpreted and applied as the Collector would interpret and apply it to Halliburton, would cast upon the taxpayer (Halliburton) a burden more onerous than that which would be levied by the Louisiana Sales and Use Tax had the transactions involved occurred in Louisiana; and, that a state Use Tax may be upheld as reasonable, legal and constitutional, only insofar as the burden thereof is equal to and not in excess of the burden of the Sales Tax of that same state, to which Sales Tax said Use Tax is complementary. Plaintiff further alleged that the tax demanded of it infringed upon the right of regulation of interstate commerce by Congress (Article I, Section 8, Clause 3, Constitution of the United States), in that it was an attempt by the State of Louisiana to lay a tax on the privilege of engaging in interstate commerce and upon the carrying on of the business of interstate commerce. It still further alleged



that it would be deprived of its property without due process of law, contrary to the protection and guaranty granted under the Constitution of the United States and particularly under the Fourteenth Amendment thereof and under Article I, Section 2, of the Constitution of the State of Louisiana, should it be required to pay the tax assessed.

The trial court agreed with plaintiff and rendered judgment in its favor after trial . . . on the following three issues:

"1. For the purposes of calculating the Louisiana Use Tax upon items of specialized oil well equipment brought into the State of Louisiana and used therein by petitioner, the Collector included the actual cost to petitioner of the physical equipment and parts purchased by petitioner outside of Louisiana, and incorporated, outside of Louisiana, into such specialized equipment, and also the labor and shop overhead, incurred by petitioner in constructing said specialized oil field equipment in its shops in Oklahoma. Halliburton admits that the physical equipment and parts should properly be included in the tax base, but denies that the labor and shop overhead were properly included. (This phase of the matter is hereinafter sometimes called 'The labor and shop overhead phase' of this case.)

"2. For the purpose of calculating the Louisiana Use Tax upon items of specialized oil well equipment brought into the State of Louisiana and used herein by petitioner, the Collector used the 'original cost' of all equipment brought into the State of Louisiana without allowance for depreciation which had occurred prior to the equipment being brought into the State of Louisiana. Halliburton contends that the values used for computing the

2 These issues appear in a stipulation of facts contained in the record.

use tax due on this equipment should not be greater than the fair market value of the equipment at the time it was brought into Louisiana. (This phase of the matter is hereinafter sometimes called **'The cost price versus depreciated value phase'** of this case.

"3. For the purpose of calculating the Louisiana Use Tax upon items of equipment brought into the State of Louisiana and used herein by petitioner, the Collector assessed the use tax on the value of certain equipment (including specialized oil well equipment and an airplane) which was purchased outside Louisiana by petitioner, from vendors not regularly engaged in the business of selling such items. Halliburton denies that any sales tax or use tax is due to the State of Louisiana on these items. (This phase of the matter is hereinafter sometimes called **'The isolated sale phase'** of this case.)"

Appellant (Collector) agrees that the trial court was correct in its ruling on Issue No. 2, "The cost price versus depreciated value phase." supra, in view of the holding of the Supreme Court of Louisiana, in the case of Fontenot v. S. E. W. Oil Corporation, 232 La. 1011, 95 So.2d 638, that a person importing an article for use in this state must pay the "use" tax the same as if it had been sold at retail, and that such use shall be considered equivalent to a sale at retail as of time of importation. The S. E. W. decision was handed down on May 6, 1957; the petition in the instant matter was filed on December 13, 1956, and judgment was rendered by the trial court on October 13, 1959. It is stated in appellant's brief:

"The Collector sought to impose the use tax on certain equipment which had sustained actual depreciation prior to its being brought into the State using as a tax base the original cost to the taxpayer. This Court has

now held in the case of *Fontenot vs. S. E. W. Oil Corporation*, 232 La. 1011, 95 So. 2d 638 (1957) that cost price means the fair market value of property at the moment of taxation—the time it becomes a part of the mass of property of the State and not original cost at the time of acquisition.

"The Collector agrees that the reasoning of the *S.E.W.* case correctly analyzes the intent and purpose of the Louisiana Use Tax and therefore will not argue this phase."

The Collector urges that the district court erred in not finding that the incidence of the Louisiana Use Tax is non-discriminatory; that it is equal in its application because it is upon the use of tangible personal property after it has been withdrawn from commerce; that the combined effect and purpose of the Sales Tax and Use Tax is to insure that all tangible personal property used or consumed in the State of Louisiana bears a 2% tax, either at the time of its original sale at retail in the state or at the time of its first use in the state if a 2% sales tax has not already been paid by the user to any other state.

The law imposing the tax in question is contained in Chapter 2 of Title 47, Louisiana Revised Statutes, entitled, "Sales Tax." The provisions pertinent to this case read as follows:

LSA-R. S. 47:302:

"A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

"(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

"(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

"C. . . .

"The tax levied in this Section shall be collected from the dealer, as defined herein, shall be paid at the time and in the manner hereinafter provided, and shall be, in addition to all other taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to taxes levied under the provisions of Chapter 3 of Sub-title II of this Title."

LSA-R.S. 47:301 (13) (As Amended):

"(13) 'Sales price' means the total amount for which tangible personal property is sold, including any services, except services for financing, that are a part of the sale valued in money, whether paid in money or otherwise, and includes the cost of materials used, labor or service costs, except costs for financing which shall not exceed the legal interest rate and a service charge not to exceed 6% of the amount financed, and losses; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the

amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold."

LSA-R. S. 47:301 (10):

"(10) 'Retail sale,' or 'sale at retail,' means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, and shall mean and include all such transactions as the collector, upon investigations, finds to be in lieu of sales; provided that sales for resale must be made in strict compliance with the rules and regulations. Any dealer making a sale for resale, which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax."

LSA-R. S. 47:301 (3):

"(3) 'Cost price' means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever."

LSA-R. S. 47:301 (18):

"(18) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business."

LSA-R. S. 47:301 (4):

"(4) 'Dealer' includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution of for storage to be used or consumed in this state."



"Dealer" is further defined to mean:

"(a) every person, who imports, or causes to be imported, tangible personal property from any state or foreign country for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state;

"(b) every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein;

"(c) any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this Chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of said tangible personal property;

\* \* \*

LSA-R. S. 47:303:

"The tax imposed under R. S. 47:302 shall be collectible from all persons, as hereinafter defined, engaged as dealers, as hereinafter defined.

"On all tangible personal property imported, or caused to be imported, from other states or foreign country, and used by him, the 'dealer', as hereinafter defined, shall pay the tax imposed by this Chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this Chapter, the use, or consumption, or distribution, or

storage to be used or consumed, in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event."

LSA-R. S. 47:305:

" \* \* \*

"It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

"The provisions of this Chapter shall not apply in respect to the use, or consumption, or distribution, or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to, or greater than, the amount imposed by this Chapter has been paid in another state, the proof of the payment of such tax to be according to rules and regulations made by the collector of revenue. If the amount of tax paid in another state is not equal to, or greater than, the amount of tax imposed by this Chapter, then the dealer shall pay to the collector of revenue an amount sufficient to make the tax paid in the other state equal to the amount imposed by this Chapter.

"The 'use tax' under this Chapter shall not apply to tangible personal property owned or acquired in this state,



or imported into this state, or held or stored in this state, prior to June 7, 1948; but the 'use tax' will apply to all tangible personal property imported or caused to be imported into this state on or after that date, unless the property has previously borne a sales or use tax in another state, equal to or greater than the tax imposed by this Chapter."

The constitutionality of a use tax has been upheld by the Supreme Court of the United States in the case of *Henneford, et al v. Silas Mason Co., Inc., et al*, 300 U.S. 577, 57 S. Ct. 524, 81 L.Ed. 814; wherein the Court stated that one of the effects of such a tax must be that local retail sellers will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. The Court further stated that another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state—buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. The Court then asked, "Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?" It answered its question as follows:

"The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. \* \* \* This is so, indeed, though they are

still in the original packages. \* \* \* For like reasons they may be subjected, when once they are at rest, to a nondiscriminatory tax upon use or enjoyment. \* \* \* The privilege of use is only one attribute, among many of the bundle of privileges that make up property or ownership. \* \* \* A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively. \* \* \* Calling the tax an excise when it is laid solely upon the use (*Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 49 P. (2d) 14) does not make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership. 'A nondiscriminatory tax upon local sales \* \* \* has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the state may be subjected.' *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147, 153, 52 S. Ct. 340, 341, 76 L.Ed. 673. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate. \* \* \* " See, *Nelson v. Sears, Roebuck & Company*, 312 U. S. 359, 85 L.Ed. 888, 61 S. Ct. 586; *State v. Pape*, 194 La. 890, 195 So. 356; *Mouledoux v. Maestri*, 197 La. 525, 2 So. 2d 11.

We conclude that under the rulings of the above authorities the "use tax" as applied to plaintiff does not infringe upon the regulation of interstate commerce by Congress. The taxed matter herein had definitely come to rest in Louisiana and had acquired a situs in the State.

Plaintiff endeavors to set forth the alleged inequality of the use tax as applied to it by arguing that if a local oil well

servicing company had manufactured its own equipment in Louisiana it would only have to pay a sales tax on the component parts employed, whereas plaintiff has been assessed a use tax not only on the component parts but also on the cost of labor and shop overhead. Plaintiff argues, as set forth, *supra*, that its burden, as compared to that of a local taxpayer, is so unequal as to constitute a violation of the 14th Amendment to the United States Constitution and of Article I, Section 2, of the Constitution of Louisiana.

"When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guaranties of the Federal Constitution, the states have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The states, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the 14th Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may tax real and personal property in a different manner. It may grant exemptions. The state is not limited to ad valorem taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the 14th Amendment was intended to assure. \* \* \*

"With all this freedom of action, there is a point beyond which the state can not go without violating the equal protection clause. The state may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The state is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *F. S. Royster Guano Co. v. Virginia*, 253 U. S. 412, 415, 64 L.ed. 989, 990, 40 Sup. Ct. Rep. 560; \* \* \* *Ohio Oil Company v. Conway*, 281 U. S. 146, 74 L. Ed. 775, 50 S. Ct. 310. See, *Allied Stores of Ohio, Inc. v. Bowers*, 79 S. Ct. 437.

"What does 'equal protection of the laws' mean as 'applied to taxation? Equal protection cannot be said to be denied by a statute which operates alike on all persons and property similarly situated, or by proceedings for the assessment and collection of taxes which follow the course customarily pursued in the state.

"The inhibition of the amendment was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. It does not require equal rates of taxation on different classes of property, nor prohibit unequal taxation so long as the inequality is not based upon arbitrary classification. Legislation which, in carrying out a public purpose, is limited in its application, does not violate the provision if, within the sphere of its operation, it affects alike all persons similarly situated. In other words it does not prohibit special legislation, or legislation that is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such

legislation shall be treated alike, under like circumstances and conditions; both in the privileges conferred and in the liabilities imposed.' The rule of equality requires no more than that the same means and methods be applied impartially to all of the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. \* \* \* " Cooley Taxation, Vol. 1, Fourth Edition, Section 249, p. 533 et seq. See, also, Section 259, p. 558, same volume.

We do not find that the Louisiana Use Tax treats any person differently from any other person in a like circumstance. All users are subjected to the same rate of tax; there is no arbitrary or unreasonable distinction. The law contains no hostility nor discrimination; it singles out no class of persons as subjects for its assessment.

**We do not find that the use tax as herein applied imposes an unconstitutional burden on plaintiff.** Plaintiff's comparison, supra, is not apposite. There must be an incidence of taxation; there must be an occurrence which brings the use tax into effect. In order to have an imposition of a sales tax, there must be a sale. Likewise, to have a levy of a use tax, property must come to rest in the State after leaving interstate commerce, and there must be a user of the property in the State. In the instant case, the fabricated product was transported to, came to rest in, became part of the common mass of property in, and was used in Louisiana. The proper comparison would be between the use tax on the assembled equipment and a sales tax on the same equipment if it were sold. What takes place before the fabricated product leaves interstate commerce and enters the State of Louisiana to rest is not within the contemplation of the statute except for the determination of cost price. Labor and shop overhead are

considered incidentally together with other items as a basis for arriving at cost. LSA-R. S. 47:305 states that the intention of the Chapter is to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this State, of tangible personal property after it has come to rest in this State and has become a part of the common mass of property in this State.

LSA-R. S. 47:301 (3) recites that:

“ ‘Cost price’ means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever.”

LSA-R. S. 47:303, *supra*, states that use tax is paid on all articles of tangible personal property imported and used, the same as if the said articles had been sold at retail for use or consumption in this State. This section was properly interpreted in the case of *Fontenot v. S. E. W. Oil Corporation*, 232 La. 1011, 95 So. 2d 638, as follows:

“According to this section the person importing an article for use in this state must pay the ‘use’ tax the same as if it had been sold at retail, and such use shall be considered equivalent to a sale at retail as of the time of importation. These provisions, along with the others above mentioned, clearly indicate that the ‘use’ tax is to be computed on the retail price the property would have brought when imported—that is, its then value or worth.”

We conclude that with respect to Issue #1, “Labor and shop overhead phase,” the use tax should be levied on “cost price” as set out in Chapter 2 of Title 47 of the Louisiana



Revised Statutes, entitled "Sales Tax," supra; the trial court was in error in omitting labor and shop overhead from the valuation assigned to the fabricated service units for use tax assessment.

We now pass to the question of "isolated sales" involved herein.

In support of its contention that the use tax cannot be imposed on tangible property which has come to rest in Louisiana but was purchased in another state through the method of isolated sales, plaintiff relies on the case of *State of Alabama v. Bay Towing & Dredging Company, Inc.*, 90 So. 2d 743, wherein the Supreme Court of Alabama stated:

"As we see it, if the use tax act is construed as imposing a tax on the use in this state of tangible personal property purchased outside the state in casual and isolated sales transactions, such tax would constitute an unlawful discrimination against interstate commerce, contrary to the Commerce Clause of the United States Constitution, Const. art. 1, sec. 8, cl. 3, since no similar or equivalent tax burden is imposed in connection with the purchase of such property in casual and isolated sales transactions within the state. \* \* \*"

We might say at the outset that we do not feel constrained to follow the Alabama case, supra, because we find that the instant matter does not involve a question of interstate commerce. The alleged taxable property had come to rest in Louisiana and had acquired a situs in this State. *Henneford, et al v. Silas Mason Co., Inc., et al*, supra.

Plaintiff argues that if the property alleged to be free from the assessment of the use tax (Issue #3, "Isolated sale



phase") had been purchased in Louisiana under similar transactions, it would not have been assessed with a sales tax, and that, therefore, the levy of the use tax on the property deprives plaintiff of its property without due process of law.

In LSA-R. S. 47:301 (10), we find the statement that the term "sale at retail" does not include an isolated or occasional sale of tangible personal property by a person not engaged in such business. In LSA-R. S. 47:305, it is directed that the dealer shall pay the tax imposed by Chapter 2 of Title 47, entitled "Sales Tax," on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state.

The exemption of an isolated sale from the provisions of the sales tax applies strictly to sales within the State of Louisiana; it has no effect whatsoever on any transactions without the state. The direction that the use tax shall be paid in the same manner as if the articles had been sold at retail applies to the method of payment. The property involved herein has not borne a similar tax in another state. Therefore, since the State of Louisiana levied the first assessment on property which was transported to, came to rest in, became part of the common mass of property in, and was used in Louisiana, we find no discrimination nor deprivation of property without due process of law.

We conclude that the trial court was in error in disallowing the tax claimed by the Collector as to Issue #3, "Isolated sale phase."

As stated, supra, the trial judge rendered judgment in favor of Halliburton and against the Collector for \$43,325.63.

plus interest at the rate of 2% from December 13, 1956, until paid, and for all costs of this suit.

The Collector agrees that the trial court was correct in its ruling on Issue #2, "The cost price versus depreciated value phase," supra, amounting to \$2,682.98. Therefore, Halliburton is entitled to the return of this amount.

The trial court was in error in decreeing that all costs be paid by the Collector: LSA-R. S. 13:4521 provides:

"Except as hereinafter provided, neither the State, nor any parish, municipality, or other political subdivision, public board or commission, shall be required to pay court costs in any judicial proceeding instituted or prosecuted by or against the state or any such parish, municipality, or other political subdivision, board or commission. This Section shall have no application to stenographers' costs for taking testimony." See, also, *Per Curiam on Further Application for Rehearing in Louisiana-Nevada Transit Co. v. Fontenot, Collector of Revenue*, 233 La. 600, 97 So. 2d 409.

For the reason assigned, the judgment appealed from in favor of plaintiff is amended by reducing the amount thereof from \$43,325.63 to \$2,682.98, with interest at the rate of 2% per annum from December 13, 1956, until paid. Appellee to pay all costs, except such as must be borne by appellant under the provisions of LSA-R. S. 13-4521.

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**APPENDIX "B"****Louisiana Sales Tax Law**

**Chapter 2 of Subtitle II of Title 47,  
Louisiana Revised Statutes of 1950, as Amended**

**LOUISIANA SALES TAX LAW**

Sec.

- 301. Definitions.
- 302. Imposition of tax.
- 303. Collection from dealer.
- 304. Treatment of tax by dealer.
- 305. Exclusions and exemptions from tax.
  - 305.1 Exclusions and exemptions; ships and ships' supplies.
  - 305.3 Exclusions and exemptions; seeds.
- 306. Returns and payment of tax.
  - 306.1 Returns and payment of tax; for hire carriers.
- 307. Collector's authority to determine the tax in certain cases.
- 308. Termination or transfer of business.
- 309. Dealers required to keep records.
- 310. Wholesalers and jobbers required to keep records.

- 311. Collector's authority to examine records of transportation companies.
- 312. Failure to pay tax on imported tangible personal property; grounds for attachment.
- 313. System of import permits; seizure and forfeiture for vehicles used in importing without permit.
- 314. Failure to pay tax; rules to cease business.
- 315. Sales returned to dealer; credit or refund of tax.
- 316. Collector to provide forms.
- 317. Cost of administration.
- 318. Disposition of collections.

### **§ 301. Definitions**

As used in this Chapter, the following words, terms and phrases have the meaning ascribed to them in this Section, except when the context clearly indicates a different meaning.

(1) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect. The term "business" shall not be construed to include the occasional and isolated sales by a person who does not hold himself out as engaged in business.

(2) "Collector" means the Collector of Revenue for the State of Louisiana and includes his duly authorized assistants.

(3) "Cost price" means the actual cost of the articles of tangible personal property without any deductions there-

from on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever.

(4) "Dealer" includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution or for storage to be used or consumed in this state.

"Dealer" is further defined to mean:

(a) every person who imports, or causes to be imported, tangible personal property from any state or foreign country for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state;

(b) every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein;

(c) any person who has sold at retail, or used, or consumed or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied in this Chapter has been paid on the sale at retail, the use, the consumption, the distribution or the storage of said tangible personal property;

(d) any person who leases or rents tangible personal property for a consideration, permitting the use or possession of the said property without transferring title thereto;

(e) any person who is the lessee or rentee of tangible personal property and who pays to the owner of such prop-

erty a consideration for the use or possession of such property without acquiring title thereto;

(f) any person, who sells or furnishes any of the services subject to tax under this Chapter;

(g) any person, as used in this act, who purchases or receives any of the services subject to tax under this Chapter;

(h) any person engaging in business in this state. "Engaging in business in this state" means and includes any of the following methods of transacting business: maintaining directly, indirectly, or through a subsidiary, an office, distribution house, sales house, warehouse or other place of business or by having an agent, salesman or solicitor operating within the state under the authority of the seller of its subsidiary irrespective of whether such place of business, agent, salesman or solicitor is located in this state permanently or temporarily or whether such seller or subsidiary is qualified to do business in this state.

(5) "Gross sales" means the sum total of all retail sales of tangible personal property, without any deduction whatsoever of any kind or character except as provided in this Chapter.

(6) "Hotel" means and includes any establishment engaged in the business of furnishing sleeping rooms primarily to transient guests where such establishment consists of ten or more guest rooms under a single roof.

(7) "Lease or rental" means the leasing or renting of tangible personal property and the possession or use thereof

by the lessee or rentee, for a consideration, without transfer of the title of such property.

(8) "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, this state, any parish, city or parish, municipality, district or other political subdivision thereof or any board, agency, instrumentality or other group or combination acting as a unit, and the plural as well as the singular number.

(9) "Purchaser" means and includes any person who acquires or receives any tangible personal property, or the privilege of using any tangible personal property, or receives any services pursuant to a transaction subject to tax under this Chapter.

(10) "Retail sale" or "sale at retail," means a sale to a consumer or to any person for any person other than for resale in the form of tangible personal property, and shall mean and include all such transactions as the collector, upon investigations, finds to be in lieu of sales; provided that sales for resale must be made in strict compliance with the rules and regulations. Any dealer making a sale for resale, which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax.

The term "sale at retail" does not include sales of materials for further processing into articles of tangible personal property for sale at retail, nor does it include an isolated or occasional sale of tangible personal property by a person not engaged in such business.



(11) "Retailer" means and includes every person engaged in the business of making sales at retail or for distribution, or use or consumption, or storage to be used or consumed in this state.

(12) "Sale" means any transfer of title or possession, or both, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication work, and the furnishing, preparing or serving, for a consideration, of any tangible personal property, consumed on the premises of the person furnishing, preparing or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price shall be deemed a sale.

(13) "Sales price" means the total amount for which tangible personal property is sold, including any services, except services for financing, that are a part of the sale valued in money, whether paid in money or otherwise, and includes the cost of materials used, labor or service costs, except costs for financing which shall not exceed the legal interest rate and a service charge not to exceed 6 percent of the amount financed, and losses; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold.

(14) "Sales of services" means and includes the following:

- (a) the furnishing of rooms by hotels and tourist camps;
- (b) the sale of admissions to places of amusement, to athletic entertainment other than that of schools, colleges and universities, and recreational events, and the furnishing, for dues, fees, or other consideration, of the privilege of access to clubs or the privilege of having access to or the use of amusement, entertainment, athletic or recreational facilities.

(Source: Act 290—1954)

- (c) the furnishing of storage or parking privileges by auto motels and parking lots;

- (d) the furnishing of printing or overprinting, lithographic, multilith, blue printing, photostating or other similar services of reproducing written or graphic matter;

- (e) the furnishing of laundry, cleaning, pressing and dyeing services, including by way of extension and not of limitation, the cleaning and renovation of clothing, furs, furniture, carpets and rugs, and the furnishing of storage space for clothing, furs and rugs.

- (f) the furnishing of cold storage space and the furnishing of the service of preparing tangible personal property for cold storage where such service is incidental to the operation of storage facilities; and

- (g) the furnishing of repairs to tangible personal property, including by way of illustration and not of limitation,

the repair and servicing of automobiles and other vehicles, electrical and mechanical appliances and equipment, watches, jewelry, refrigerators, radios, shoes, and office appliances and equipment.

(15) "Storage" means and includes any keeping or retention in this state of tangible personal property for use or consumption in this state or for any purpose other than for sale at retail in the regular course of business.

(16) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, or other obligations or securities.

(17) "Tourist camps" means and includes any establishment engaged in the business of furnishing rooms, cottages or cabins to tourists or other transient guests, where the number of guest rooms, cottages, or cabins at a single location is six or more.

(18) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business.

(19) "Use tax" includes the use, the consumption, the distribution and the storage, as herein defined.

(Source: Acts 1948 No. 9, § 6.)

### § 302. Imposition of tax.

A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage

for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

B. There is hereby levied a tax upon the lease or rental within this state of each item or article of tangible personal property, as defined herein; the levy of said tax to be as follows:

(1) At the rate of two per centum (2%) of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, where the lease or rental of such property is an established business, or part of an established business, or the same is incidental or germane to the said business.

(2) At the rate of two per centum (2%) of the monthly lease or rental price paid by lessee or rentee, or contracted or agreed to be paid by lessee or rentee to the owner of the tangible personal property.

C. There is hereby levied a tax upon all sales of services, as herein defined, in this State, at the rate of two per centum (2%) of the amounts paid or charged for such services.

The tax levied in this Section shall be collected from the dealer, as defined herein, shall be paid at the time and in the manner hereinafter provided, and shall be, in addition to all other taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to taxes levied under the provisions of Chapter 3 of Subtitle II of this Title.

(Source: Acts 1948, No. 9, § 2.)

### **§ 303. Collection from dealer**

The tax imposed under R.S. 47:302 shall be collectible from all persons, as hereinafter defined, engaged as dealers, as hereinafter defined.

On all tangible personal property imported, or caused to be imported, from other states or foreign country, and used by him, the "dealer," as hereinafter defined, shall pay the tax imposed by this Chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this Chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

(Source: Acts 1948, No. 9 § 3.)

### **§ 304. Treatment of tax by dealer**

The tax levied in this Chapter shall be collected by the dealer from the purchaser or consumer.

Every dealer located outside the state making sales of tangible personal property for distribution, storage, use, or consumption, in this state, shall at the time of making sales collect the tax imposed by this Chapter from the purchaser.

Dealers shall, as far as practicable, add the amount of the tax imposed under this Chapter in conformity with the schedule or schedules to be prescribed by the collector pursuant to authority conferred herein, to the sale price or charge, which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts. Any dealer who neglects, fails or refuses to collect the tax herein provided, shall be liable for and pay the tax himself.

Where the tax collected for any period is in excess of two per centum (2%), the total tax collected must be paid over to the collector of revenue, less the compensation to be allowed the dealer, as hereinafter set forth. This provision shall be construed with other provisions of this Chapter and given effect so as to result in the payment to the collector of revenue of the total tax collected if in excess of two per centum (2%).

Any dealer who fails, neglects, or refuses to collect the tax herein provided, either by himself or through his agents or employees, shall, in addition to the penalty of being liable for and paying the tax himself, be fined not more than one hundred dollars, or imprisoned for not more than three months, or both.

No dealer shall advertise or hold out to the public, in any manner, directly or indirectly, that he will absorb all or part of the tax or that he will relieve the purchaser from the payment of all or any part of the tax. Whoever violates this provision with respect to advertising shall be fined not less than twenty-five dollars nor more than two hundred fifty dollars, or imprisoned for not more than three months, or both. For a second or subsequent offense, the penalty shall be double.

The dealer or seller is permitted and required to state and collect the tax separately from the price paid by the purchaser.

The use of tokens is forbidden. The collector shall by regulations prescribe the method and the schedule of the amounts to be collected from the purchasers, lessees or consumers in respect to any receipt upon which a tax is imposed by this Chapter so as to eliminate fractions of one cent and so that the aggregate collections of taxes by a dealer shall, as far as practicable, equal two per centum of the total receipts from the sales, leases and services of such dealer upon which a tax is imposed. The schedules may provide that no tax need be collected from the purchaser, lessee or consumer upon receipts below a stated sum and may be amended from time to time so as to accomplish the purposes herein set forth.

In the event any political subdivision of this state is authorized to levy and levies a sales tax, the collector of revenue, in his discretion, may provide methods or schedules to accomplish the integration of the collection of the state and local taxes. Separate integrated bracket schedules may be provided for different kinds of transactions where all such transactions are not subject to both the state and the local tax.

(Source: Acts 1948, No. 9, § 4.)



### § 305. Exclusions and exemptions from the tax

The gross proceeds derived from the sale in this state of livestock, poultry and other farm products direct from the farm are exempted from the tax levied by this Chapter, provided that such sales are made directly by the producers. When sales of livestock, poultry and other farm products are made to consumers by any person other than producer, they are not exempted from the tax imposed by this Chapter; but every agricultural commodity sold by any person, other than a produceer, to any other person who purchases not for direct consumption but for the purpose of acquiring raw product for use or for sale in the process of preparing, finishing or manufacturing such agricultural commodity for the ultimate retail consumer trade, shall be exempted from any and all provisions of this Chapter, including payment of the tax applicable to the sale, storage, use, transfer, or any other utilization of or handling thereof, except when such agricultural commodity is actually sold as a marketable or finished product to the ultimate consumer, and in no case shall more than one tax be exacted. For the purpose of this Section, "agricultural commodity," means horticultural, viticultural, poultry, farm and range products, and livestock and livestock products.

The "use tax," as defined herein, shall not apply to livestock and livestock products, to poultry and poultry products, to farm, range and agricultural products when produced by the farmer and used by him and members of his family.

The taxes imposed by this Chapter shall not apply to the following: Sales of used articles taken in trade, or a series of trades, as a credit or part payment on the sale of a new article, provided the tax levied by this Chapter is paid on

the full gross sales of the new article. In interpreting this provision, the term "new article" means the original stock in trade of the dealer and shall not be limited to newly manufactured articles. The original stock or article, whether it be a used article or not, shall be subject to the tax.

With respect to sale of automobiles and all kinds of motor vehicles that are subject to tax by this Chapter, it shall be the duty of the dealer to give to the purchaser at the time of the sale, a certificate or an affidavit, as may be determined by the collector, signed by the dealer, in such form as may be prescribed by the collector, showing the serial number, motor number, type and model of motor vehicle, and whether or not the tax imposed by this Chapter has been paid. If the tax has not been paid because of the fact that the motor vehicle was taken in trade and is not subject to tax, then the dealer shall give to the purchaser a certificate or an affidavit signed by the dealer showing that the motor vehicle is not subject to tax. The collector of revenue, if deemed necessary, may by rule and regulation require all dealers engaged in selling automobiles and motor vehicles of all kinds to make a report every fifteen days showing all sales of automobiles or other motor vehicles which are taxable and all sales of automobiles and motor vehicles which are not subject to tax, giving the name and address of each purchaser and a description, including serial number, motor number, type and model of each automobile or motor vehicle that has been sold during the period covered by the report.

The sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed, in this state, of the following tangible personal property is hereby specifically exempted from the tax imposed by this Chapter: Gaso-

line; steam; water (not including mineral water or carbonated water or any water put up in bottles, jugs, or other containers, all of which are not exempted); electric power or energy; newspapers; fertilizer, seeds and containers used for farm products when sold directly to the farmer; and natural gas.

Seeds (Act 427 - 1960)

It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

The provisions of this Chapter shall not apply in respect to the use, or consumption, or distribution, or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to, or greater than, the amount imposed by this Chapter has been paid in another state, the proof of the payment of such tax to be according to rules and regulations made by the collector of revenue. If the amount of tax paid in another state is not equal to, or greater than, the amount of tax imposed by this Chapter, then the dealer shall pay to the collector of revenue an amount sufficient to make the tax paid in the other state and in this state equal to the amount imposed by this Chapter.

The "use tax" under this Chapter shall not apply to tangible personal property owned or acquired in this state, or

imported into this state, or held or stored in this state, prior to June 7, 1948; but the "use tax" will apply to all tangible personal property imported or caused to be imported into this state on or after that date, unless the property has previously borne a sales or use tax in another state, equal to or greater than the tax imposed by this Chapter.

(Source: Acts 1948, No. 9, § 5.)

### **§ 305.1 Exclusions and exemptions; ships and ships' supplies**

A. The tax imposed by R.S. 47:302 (A) (1) shall not apply to sales of materials, equipment and machinery which enter into and become component parts of ships, vessels, including commercial fishing vessels, or barges, of fifty tons load displacement and over, built in Louisiana nor to the gross proceeds from the sale of such ships, vessels, or barges when sold by the builder thereof.

B. The taxes imposed by R.S. 47:302 shall not apply to materials and supplies purchased by the owners or operators of ships or vessels operating exclusively in foreign or interstate coastwise commerce, where such materials and supplies are loaded upon the ship or vessel for use or consumption in the maintenance and operation thereof; nor to repair services performed upon ships or vessels operating exclusively in foreign or interstate coastwise commerce; nor to the materials and supplies used in such repairs where such materials and supplies enter into and become a component part of such ships or vessels; nor to laundry services performed for the owners or operators of such ships or vessels operating exclusively in foreign or interstate coastwise commerce, where the laundered articles are to be used in the course of the operation of such ships or vessels.

C. The provisions of this section do not apply to drilling equipment used for oil exploitation or production unless such equipment is built for exclusive use outside the boundaries of the state and is removed forthwith from the state upon completion.

D. The Collector shall promulgate rules and regulations designed to carry out the provisions of this section. Any transaction not strictly in compliance with such rules and regulations shall lose the exemption herein provided.

(Source: Act 51—1959)

### **§ 305.3 Exclusions and exemptions; seeds used in planting of crops**

The tax imposed by R.S. 47:302(A) (1) shall not apply to the sale at retail of seeds for use in the planting of any kind of crops. The Collector shall promulgate rules and regulations designed to carry out the provisions of this section, and any transaction not strictly in compliance with such rules and regulations shall lose the exemption herein provided.

(Source: Act 427—1960)

### **§ 306. Returns and payment of tax**

The taxes levied hereunder shall be due and shall be payable monthly. For the purpose of ascertaining the amount of tax payable all dealers shall, on or before the 20th day of the month following the month in which this tax becomes effective, transmit to the collector, upon forms prescribed, prepared and furnished by him, returns showing the gross sales, purchases, gross proceeds from lease or rental, gross payments for lease or rental, gross proceeds derived from sales of services, or gross payments for services, as the case

may be, arising from all taxable transactions during the preceding calendar month; and thereafter, like returns shall be prepared and transmitted to said collector by all dealers, on or before the 20th day of each month, for the preceding calendar month. These returns shall show any further information the collector may require to enable him to correctly compute and collect the tax levied. Every dealer at the time of making the return required hereunder, shall compute and remit to the collector the required tax due for the preceding calendar month; and failure to so remit such tax shall cause said tax to become delinquent.

Gross proceeds from rentals or leases of tangible personal property shall be reported and the tax shall be paid with respect thereto, in accordance with the rules and regulations the collector may prescribe.

For the purpose of compensating the dealer in accounting for and remitting the tax levied by this Chapter, each dealer shall be allowed two per centum (2%) of the amount of tax due and accounted for and remitted to the collector in the form of a deduction in submitting his report and paying the amount due by him; provided the amount due was not delinquent at the time of payment. Provided that municipalities are hereby authorized to pay compensation to their sales tax dealer in any amount designed by the governing body of said municipality.

The collector, for good cause, may extend, for not to exceed thirty days, the time for making any returns required under the provisions of this Chapter.

For the purpose of collecting and remitting to the state



the tax imposed by this Chapter, the dealer is hereby declared to be the agent of the state.

(Source: Act 491--1954)

**§ 306.1. Collection from interstate and foreign transportation dealers**

Persons, as defined in this Chapter, engaged in the business of transporting passengers or property for hire in interstate or foreign commerce, whether by railroad, railway, automobile, motor truck, boat, ship, aircraft or other means, may, at their option under rules and regulations prescribed by the Collector, register as dealers and pay the taxes imposed by R.S. 47:302A on the basis of the formula hereinafter provided.

Such persons, when properly registered as dealers, may make purchases in this state or import property into this state without payment of the sales or use taxes imposed by R.S. 47:302A at the time of purchase or importation, provided such purchases or importations are made in strict compliance with the rules and regulations of the Collector. Thereafter, on or before the 20th day of the month following the purchase or importation, the dealer shall transmit to the Collector, on forms secured by him, returns showing gross purchases and importations of tangible personal property, the cost price of which has not previously been included in a return to the state. The amount of such purchases and importations shall be multiplied by a fraction, the numerator of which is Louisiana mileage operated by the taxpayer and the denominator of which is the total mileage, to obtain the taxable amount of tax basis. This amount shall be multiplied by the tax rate to disclose the tax due.



Each such dealer, at the time of making the return required hereunder, shall remit to the Collector the tax due for the preceding calendar month as shown on the return.

(Source: Act 440—1958)

**§ 307. Collector's authority to determine the tax in certain cases**

A. In the event any dealer fails to make a report and pay the tax as provided in this Chapter or in case the dealer makes a grossly incorrect report or a report that is false or fraudulent, the collector shall make an estimate of the retail sales of such dealer for the taxable period, of the gross proceeds from rentals or leases of tangible personal property by the dealer, or the cost price of all articles of tangible personal property imported by the dealer for use or consumption or distribution or storage to be used or consumed in this state, and of the gross amounts paid or charged for services taxable; and it shall be the duty of the collector to assess and collect the tax together with any interest and penalty that may be accrued thereon, which assessment shall be considered prima facie correct and the burden to show the contrary shall rest upon the dealer.

B. In the event the dealer has imported tangible personal property and he fails to produce an invoice showing the cost price of the articles which are subject to tax, or the invoice does not reflect the true or actual cost, then the collector shall ascertain in any manner feasible the true cost price and shall assess and collect the tax, together with any interest and penalties that may have accrued, on the basis of the true cost as assessed by him. The assessment so made shall be considered prima facie correct, and the burden shall be on the dealer to show the contrary.

C. In the case of the lease or rental of tangible personal property, if the consideration given or reported by the dealer does not in the judgment of the collector, represent the true or actual consideration, then the collector is authorized to ascertain in any manner feasible the true or actual consideration and assess and collect the tax thereon together with any interest and penalties that may have accrued. The assessment so made shall be considered prima facie correct and the burden shall be on the dealer to show the contrary.

D. In the event such estimate and assessment requires an examination of books, records, or documents, or an audit thereof, then the collector shall add to the assessment the cost of such examination, together with any penalties accruing thereon. Such costs and penalties when collected shall be remitted to the State Treasurer in the same manner as the taxes are remitted to him by the collector.

(Source: Acts 1948, No. 9, § 8.)

### **§ 308. Termination or transfer of business**

If any dealer liable for any tax, interest or penalty levied hereunder sells his business or stock of goods or quits the business, he shall make a final return and payment within fifteen days after the date of selling or quitting the business. His successor, successors or assigns, if any, shall withhold sufficient of the purchase money to cover the amount of such taxes, interest and penalties due and unpaid until such time as the former owner shall produce a receipt from the collector showing that they have been paid, or a certificate stating that no taxes, interest or penalties are due. If the purchaser of a business or stock of goods fails to withhold purchase money as above provided, he shall be personally

liable for the payment of the taxes, interest and penalties accrued and unpaid on account of the operation of the business by any former owner, owners or assigns.

(Source: Acts 1948, No. 9, § 9.)

### § 309. Dealers required to keep records

Every dealer required to make a report and pay any tax under this Chapter shall keep and preserve suitable records of the sales, purchases, or leases taxable under this Chapter, and such other books of accounts as may be necessary to determine the amount of tax due hereunder; and other information as may be required by the collector; and each dealer shall secure, maintain and keep, for a period of three years, a complete record of tangible personal property received, used, sold at retail, distributed, or stored, leased or rented, within this state by the said dealer, together with invoices, bills of lading, and other pertinent records and papers as may be required by the collector for the reasonable administration of this Chapter, and a complete record of all sales or purchases or services taxable under this Chapter. These records shall be open for inspection to the collector at all reasonable hours. The collector is authorized to require all dealers who take deductions on their sales tax returns for total sales under the minimum taxable bracket prescribed by him pursuant to R.S. 47:304 to support their deductions by keeping written or printed detail records of said sales in addition to their usual books and accounts.

Any dealer subject to the provisions of this Chapter who violates the provisions of this Section shall be fined not more than two hundred dollars, or imprisoned for not more than sixty days, or both, for any such offense.

(Source: Acts 1948, No. 9, § 11.)

### **§ 310. Wholesalers and jobbers required to keep records**

All wholesale dealers and jobbers in this state shall keep a record of all sales of tangible personal property made in this state whether such sales be made for cash or on terms of credit. These records shall contain and include the name and address of the purchaser, the date of the purchase, the article purchased and the price at which the article is sold to the purchaser. These records shall be kept for a period of three years and shall be open to the inspection of the collector at all reasonable hours.

Whoever violates the provisions of this Section shall be fined not less than fifty dollars nor more than two hundred dollars, or imprisoned for not less than ten days nor more than thirty days, or both, for the first offense. For the second or each subsequent offense, the penalty shall be double.

(Source: Acts 1948, No. 9, § 12.)

### **§ 311. Collector's authority to examine records of transportation companies**

The collector is specifically authorized to examine at all reasonable hours, the books, records and other documents of all transportation companies, agencies, or firms operating in this state, whether they conduct their business by truck, rail, water, airplane, or otherwise, in order to determine what dealers are importing or are otherwise shipping articles of tangible personal property subject to the tax levied by this Chapter. When any such transportation company refuses to permit the examination of its books, as provided in this Section, the collector may proceed by rule against it, in term time or in vacation, in any court of competent jurisdiction in the

parish where such refusals occurred, to show cause why the collector should not be permitted to examine books, records or other documents. This rule may be tried in open court or in chambers, and in case the rule is made absolute, the same shall be considered a judgment of the court, and every violation thereof shall be considered as a contempt of court and punished according to law.

(Source: Acts 1948, No. 9, § 13.)

**§ 312. Failure to pay tax on imported tangible personal property; grounds for attachment**

The failure of any dealer to pay the tax and any interest, penalties, or costs due under the provisions of this Chapter on any tangible personal property imported from outside the state for use, consumption, distribution or storage to be used in this state, or imported for the purpose of leasing or renting the same, shall make the tax, interest, penalties, or costs ipso facto delinquent. This failure shall moreover be a sufficient ground for the attachment of the personal property imported wherever it may be found, whether the delinquent taxpayer is a resident or nonresident, and whether the property is in the possession of the delinquent taxpayer or in the possession of other persons.

It is the intention of this law to prevent the disposition of the said tangible personal property in order to insure payment of the tax imposed by this Chapter, together with interest, penalties and costs, and authority to attach is hereby specifically granted to the collector. The procedure prescribed by law in attachment proceedings shall be followed except that no bond shall be required of the State.

(Source: Acts 1948, No. 9, § 17.)

**§ 313. System of import permits; seizure and forfeiture of vehicles used in importing without permit**

A. In order to prevent the illegal importation of tangible personal property which is subject to tax, and to strengthen and make more effective the manner and method of enforcing payment of the tax imposed by this Chapter, the collector is hereby authorized to put into operation a system of permits whereby any person or dealer may import tangible personal property by truck, automobile, or other means of transportation other than a common carrier, without having the truck, automobile or other means of transportation seized and subjected to legal proceeding for its forfeiture. Such system of permits shall require the person or dealer who desires to import tangible personal property subject to tax imposed by this Chapter, to apply to the collector for a permit, stating the kind of vehicle to be used, the name of the driver, the license number of the vehicle, the kind or character of tangible personal property to be imported, the date, the name and address of the consignee, and such other information as the collector may deem proper or necessary. These permits shall be free of cost to the applicant and may be obtained at any of the branch offices of the department of revenue, including the branch offices located at Shreveport and Lake Charles.

B. The importation into this state of tangible personal property which is subject to tax, by truck, automobile, or other means of transportation other than a common carrier, without having first obtained a permit described above, (if the tax imposed by this Chapter has not been paid), is prohibited and shall be construed as an attempt to evade payment of the tax; and the truck, automobile, or means of trans-



portation other than a common carrier, as well as the taxable property may be seized by the collector in order to secure the same as evidence in a trial, and it shall be subject to forfeiture and sale in the manner provided for in this Chapter.

C. The collector is authorized in a summary proceeding, or by an action against the owner or operator of any truck, automobile or means of transportation other than a common carrier, used in the illegal importation and transportation of any article or articles of tangible personal property on which a tax is levied by this Chapter, and on which the tax has not been paid to demand the forfeiture and sale of the truck, automobile or other means of transportation, together with the said taxable property, used in the illegal importation and in violation of this Chapter.

D. In all cases where it is made to appear by affidavit that the residence of the owner of the automobile, truck or other means of transportation is out of the state, or is unknown to the collector, the court having jurisdiction of the proceeding shall appoint an attorney at law to represent the absent owner against whom the proceeding shall be tried contradictorily within ten days after the filing of the same. The affidavit may be made by the Collector or one of his assistants, or by the attorney representing the collector, if it is not convenient to obtain the affidavit of the collector or one of his assistants. The attorney appointed to represent the absent owner may waive service and citation of the petition or rule, but he shall not waive any legal defense. If, upon the trial of the proceeding, it is established that the automobile, truck, or other means of transportation, has been used to transport any article of tangible personal property upon which a tax is levied by this Chapter, and upon which



the tax has not been paid, without first having obtained a permit from the collector as provided herein, then the court shall render judgment accordingly, declaring the forfeiture of the taxable property and of the automobile, truck, or other means of transportation and ordering the sale thereof after ten days' notice by advertisement in the official parish paper where the seizure is made, by the civil sheriff of the parish of Orleans, or by the sheriff of the parish in which the seizure is made; this sale shall be made at public auction at the court house, to the highest bidder, for cash, and without appraisalment. It is the intent and purpose of these proceedings to afford the owner of the automobile, truck or other means of transportation a fair opportunity for hearing in a court of competent jurisdiction. It is further the intent and purpose of these proceedings that the forfeiture and sale of the automobile, truck or other means of transportation, and of the taxable property being transported therein, shall be and operate as a penalty for the violation of this Chapter by the illegal transportation and importation of tangible personal property subject to the tax; and the payment of the tax due on the article upon which a tax is levied by this Chapter, at the moment of seizure or thereafter, shall not operate to prevent, abate, discontinue or defeat the forfeiture and sale of the property. All funds collected from the seized and forfeited property shall be paid into the state treasury and credited in the same manner as provided for the tax herein levied. The court shall fix the fee of the attorney representing the owner when appointed by the court, at a nominal sum not to exceed ten per centum (10%) to be taxed as costs and to be paid out of the proceeds of the sale of the property.

\* (Source: Acts 1948, No. 9, § 18.)

### § 314. Failure to pay tax; rule to cease business

Failure to pay any tax due as provided in this Chapter shall ipso facto, without demand or putting in default, cause the tax interest, penalties, and costs to become immediately delinquent, and the collector has the authority, on motion in a court of competent jurisdiction, to take a rule on the dealer, to show cause in not less than two or more than ten days, exclusive of holidays, why the dealer should not be ordered to cease from further pursuit of business as a dealer. This rule may be tried out of term and in chambers, and shall always be tried by preference. If the rule is made absolute, the order rendered thereon shall be considered a judgment in favor of the state, prohibiting the dealer from the further pursuit of said business until such time as he has paid the delinquent tax, interest, penalties and costs, and every violation of the injunction shall be considered as a contempt of court, and punished according to law. For the purpose of the enforcement of this Chapter and the collection of the tax levied hereunder, it is presumed that all tangible personal property imported or held in this state by any dealer is to be sold at retail, used or consumed, or stored for use or consumption in this state, or leased or rented within this state, and is subject to the tax herein levied; this presumption shall be prima facie only, and subject to proof furnished to the collector.

(Source: Acts 1948, No. 9, § 19.)

### § 315. Sales returned to dealer; credit or refund of tax

In the event tangible personal property sold is returned to the dealer by the purchaser or consumer or in the event the amount paid or charged for services is refunded or

credited to the purchaser or consumer after the tax imposed by this Chapter has been collected, or charged to the account of the purchaser, consumer, or user, the dealer shall be entitled to reimbursement of the amount of tax so collected or charged by him, in the manner prescribed by the collector; and in case the tax has not been remitted by the dealer to the collector, the dealer may deduct the same in submitting his return. Upon receipt of a sworn statement of the dealer as to the gross amount of such refunds during the period covered by the sworn statement, which period shall not be longer than ninety (90) days, the collector shall issue to the dealer an official credit memorandum equal to the net amount remitted by the dealer for the tax collected. This memorandum shall be accepted by the collector at full face value from the dealer to whom it is issued, in the remittance for subsequent taxes accrued under the provisions of this Chapter.

In cases where a dealer has retired from business and has filed a final return, a refund of tax may be made if it can be established to the satisfaction of the collector that the tax paid was not due.

(Source: Acts 1948, No. 9 § 20.)

### **§ 316. Collector to provide forms**

The collector shall design, prepare, print and furnish to all dealers, or make available to them, all necessary forms for filing returns, and instructions to insure a full collection from dealers and an accounting for the taxes due; but failure of any dealer to secure these forms shall not relieve the dealer from the payment of the tax at the time in the manner herein provided.

(Source: Acts 1948, No. 9, § 25.)

**§ 317. Cost of administration**

The cost of preparing and distributing the report forms and paraphernalia for the collection of the tax, and for the inspection and enforcement duties required herein, shall be borne by the revenue produced by this Chapter and the collector shall withhold from the first sums realized on the collection of the tax levied hereunder, a sum not to exceed three hundred fifty thousand dollars (\$350,000.00) per annum.

(Source: Acts 1948, No. 9, § 26.)

**§ 318. Disposition of collections**

All taxes collected under the provisions of this Chapter shall be paid to the collector, and the proceeds of all taxes collected under the provisions of this Chapter, less the commission to dealers, and the cost of collecting the taxes as herein provided for, shall be paid by the collector to the State Treasurer on or before the tenth day of the month following the collection of the tax; the State Treasurer shall credit the tax to a special fund, to be known as the Public Welfare Fund, and the Department of Public Welfare shall withdraw the same from the treasury for payment of old age assistance and other welfare purposes.

(Source: Acts 1948, No. 9, § 27.)

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**SUPREME COURT, U. S.  
IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1961**

**No. ~~204~~ 24**

**HALLIBURTON OIL WELL CEMENTING  
COMPANY,**

**Appellant,**

*versus*

**JAMES S. REILY, COLLECTOR OF REVENUE,  
STATE OF LOUISIANA (Since Succeeded by Rob-  
ert L. Roland, Who Was Duly Succeeded by  
Roland Cocreham),**

**Appellee.**

**ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF LOUISIANA.**

**BRIEF OF AMICUS CURIAE (REPRESENTING  
THOMAS JORDAN, INC.)**

**CHARLES D. MARSHALL,  
1122 Whitney Building,  
New Orleans 12, Louisiana,  
*Amicus Curiae*  
(Attorney for Thomas Jordan, Inc.)**

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1961

**No. 264**

HALLIBURTON OIL WELL CEMENTING  
COMPANY,

Appellant,

*versus*

JAMES S. REILY, COLLECTOR OF REVENUE,  
STATE OF LOUISIANA (Since Succeeded by Rob-  
ert L. Roland, Who Was Duly Succeeded by  
Roland Cooreham),

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF LOUISIANA.

BRIEF OF AMICUS CURIAE (REPRESENTING  
THOMAS JORDAN, INC.)

**The Issue.**

The issue herein is this: Can a state levy a use tax solely because property is purchased outside the state, there being no sales tax imposed on a like purchase within the state?

**Thomas Jordan, Inc., Represented by the Amicus Curiae, Has a Parallel Issue.**

Jordan is in the business of renting barges to others in Louisiana. Many of Jordan's barges were built for Jordan by shipyards outside Louisiana. In litigation pending before the Board of Tax Appeals for the State of Louisiana, the State is claiming from Jordan sales and use tax in the amount of \$49,999.24 on account of these vessels.<sup>1</sup> At the time such vessels were built, the Louisiana sales tax would not have applied to their construction had it occurred in Louisiana.<sup>2</sup> The State nevertheless contends that use tax is due because of the out of state origin of the vessels.

Similarly, in the case at bar the issue is whether Halliburton must pay use tax on property brought by it into Louisiana although Halliburton would owe no sales tax to Louisiana if it had purchased such property within the State. Halliburton bought a used airplane and used oil field equipment outside Louisiana from persons not in the business of making such sales. Such sales are exempt from sales tax in Louisiana.<sup>3</sup> Yet, because Halliburton bought this property out of the State, Louisiana endeavors to collect use tax. Once again, it is only the out of state purchase and movement across the state line that results in the claim of tax.

<sup>1</sup> Docket No. 993, Board of Tax Appeals of the State of Louisiana.

<sup>2</sup> This position is founded on *State v. J. Watts Kearney & Sons*, 181 La. 554, 160 So. 77, and *Claiborne Sales Co. v. Collector*, 233 La. 1061, 99 So. 2d 345.

<sup>3</sup> La. R.S. of 1950, 47:301 (10), printed at p. 73 of the Jurisdictional Statement.



### The Significance of the Issue.

U  
If a state may levy a use tax on property solely because of its out-of-state origin, war can be waged against interstate commerce. Louisiana Act 51 of 1959 exempts from sales and use tax vessels of fifty tons and over built in Louisiana shipyards.<sup>1</sup> If Louisiana may exempt vessels built in its yards while taxing vessels built in Mississippi and Texas yards, Louisiana has a potent weapon with which to discourage interstate commerce. Retaliation is certain, and economic barriers at state lines may result.

### The Need for a Decision by This Court.

There has not been a decision by this Court outlining the need for equality between the application of the sales and use taxes so as to avoid discrimination against interstate commerce. In *Henneford v. Silas Mason Co.*, this Court sustained the validity of a use tax because "equality" existed between the sales and use taxes there involved;<sup>2</sup> nothing was said which would justify the imposition of a use tax which goes beyond the sales tax and discriminates against interstate commerce. Any such discrimination appears illegal under the decisions of this Court in analogous situations.<sup>3</sup>

The necessity for a statement by this Court of guiding principles arises from the decision of the Louisiana Supreme Court in this case, which found no con-

<sup>1</sup> La. R.S. of 1950, 47:305.1, printed at p. 84 of the Jurisdictional Statement.

<sup>2</sup> 300 U.S. 577, 584.

<sup>3</sup> See *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389, and *Walling v. Michigan*, 116 U.S. 446.

stitutional impediment to exist. The Alabama Supreme Court has decided exactly the opposite.<sup>7</sup> The movement of property across state lines is in ever increasing tempo and the problem in the case at bar is, and will be, of widespread occurrence.

### CONCLUSION.

It is submitted that this Court should maintain jurisdiction of the appeal and reverse the decision of the Louisiana Supreme Court.

<sup>7</sup> See p. 64 of the Jurisdictional Statement filed by Appellant.

<sup>8</sup> *State v. Bay Towing and Dredging Company*, 265 Ala. 282, 90 So. 2d 743.

Respectfully submitted,

CHARLES D. MARSHALL,

1122 Whitney Building,

New Orleans 12, Louisiana,

*Amicus Curiae*

(Attorney for Thomas Jordan, Inc.)

LIBRARY  
**Supreme Court of the United States**

OCTOBER TERM, 1961

No. **264**

**HALLIBURTON OIL WELL CEMENTING COMPANY,**  
Appellant,

versus

**JAMES S. REILY, COLLECTOR OF REVENUE, STATE  
OF LOUISIANA** (Since Succeeded by Robert L.  
Roland, Who Was Duly Succeeded by Roland  
Coereham),

Appellee.

On Appeal from the Supreme Court of the State of  
Louisiana.

**AMICUS CURIAE BRIEF BY ATTORNEY  
FOR SPERRY RAND CORPORATION**

CICERO C. SESSIONS,

1333 National Bank of Comm. Bldg.,  
New Orleans 12, La.

(Attorney for Sperry Rand  
Corporation).

AMICUS CURIAE.

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**SUPREME COURT OF THE UNITED STATES**

**October Term, 1961**

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**No. 264**

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**HALLIBURTON OIL WELL CEMENTING COMPANY,**

**Appellant,**

**versus**

**JAMES S. REILY, COLLECTOR OF REVENUE, STATE  
OF LOUISIANA (Since Succeeded by Robert L.  
Roland, Who Was Duly Succeeded by Roland  
Coereham),**

**Appellee.**

---

**On Appeal from the Supreme Court of the State of  
Louisiana.**

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*May It Please The Court:*

**STATEMENT OF THE ISSUE.**

The gravamen of the appeal is whether or not the State of Louisiana may levy its tax on property acquired outside of Louisiana and brought into Louisiana when the sales tax levied by the same statute is not imposed on a like acquisition within Louisiana.

## SPERRY RAND CORPORATION IS CONFRONTED WITH A RELATED ISSUE.

Sperry Rand Corporation is a Delaware corporation, qualified to do business in the State of Louisiana. One of its operating divisions is its Remington Rand Division, and for the purpose hereof this corporation shall be referred to hereinafter as Remington Rand. Among other business activities, Remington Rand itself manufactures outside of Louisiana office equipment, which property of its own it brings into Louisiana and rents to customers. It concedes to be due and has always paid the rental tax levied upon rentals of such property by the Louisiana Sales and Use Tax<sup>1</sup>, particularly by the levying section thereof which applies to sales, use, rentals<sup>2</sup> and services.

Appellee's regulations for the administration of the statute provide in pertinent part, in Article 2-4 thereof, that the tax is computed on:

\*\*\* the gross receipts or gross proceeds without any deduction whatsoever for expenses incident to the conduct of business \*\*\*  
and

\*\*\* the gross receipts or gross proceeds derived from the lease or rental of accounting machines, office equipment, \*\*\* and equipment of all kinds, as well as other articles of tangible personal property \*\*\*

<sup>1</sup> LSA-R.S. 47:301, et seq.; Appellant's Jurisdictional Statement, page 69, et seq.

<sup>2</sup> LSA-R.S. 47:302 B; page 77, Appellant's Jurisdictional Statement. See also LSA-R.S. 47:301(7); pages 72-73, Appellant's Jurisdictional Statement.

are within the provisions of the act.

Tax controversy about this rental property began with Appellee's notice to Remington Rand of a proposed use tax assessment<sup>3</sup> in addition to (and, not in lieu of) the rental tax being paid as aforesaid. The precise base of such use tax levy has not been disclosed by Appellee, as the proposed assessment merely specifies a use tax due of \$4,710.98 for the period January 1, 1957 through March 31, 1960, plus interest.<sup>4</sup> Subsequent periods and rental transactions therein are implicit also in the dispute, with no disclosure from appellee to this time what tax amount it claims therefor.

In addition to the statutory basis for its notice,<sup>5</sup> appellee's main claim originally pegged upon a Louisiana appellate decision under the same statute<sup>6</sup> that the purchase outside of Louisiana and importation of a fleet of automobiles into Louisiana for rental therein subjected the owner to the use tax as well as the rental tax which it was voluntarily paying.

The factual distinction between an owner making an out-of-state purchase for importation and rental of the same property and Remington Rand's actual manufacture of its own property elsewhere and importing it into Louisiana for rental seems plainly obvious. As inapposite as is the decision in *U-Drive-It Car Company*,

<sup>3</sup> Pursuant to LSA-R.S. 47:302 A(2); see page 77, Appellant's Jurisdictional Statement.

<sup>4</sup> Louisiana's Constitution provides a three-year period of prescription (limitation) for the collection of such taxes. Vol. 3, West's LSA Constitution, Article 19, section 19, page 421.

<sup>5</sup> Section 302, A(2), supra.

<sup>6</sup> *State of Louisiana v. U-Drive-It Car Company, Inc.*, 79 So. 2d 590, (Court of Appeal, Orleans, 1955), rehearing denied; certiorari denied.



*supra*, nevertheless its combination with the decision here on appeal pictures clearly the propinquity of Remington Rand's position with that of Appellant.<sup>7</sup>

Even more closely are these positions allied by application to Remington Rand of the Collector's stipulation as to Appellant.<sup>8</sup> This is the true nexus among Appellant, Remington Rand, other amici curiae and still others similarly situated. Stated plainly, if Remington Rand's place of manufacture of its rental property were situated in Louisiana, its tax base would be entirely identical<sup>9</sup> with that of any other domestic manufacturer of property for similar intrastate use.<sup>10</sup>

The position of the Collector thus thrusts against all who manufacture their own property outside of Louisiana and bring it into that state to occupy, as the Collector would have it, a tax climate entirely different from that enjoyed by a local manufacturer. Shearing its verbiage to the result, the Louisiana Supreme Court's decision impels the tax directly at the out of state purchase and movement of its across the state line.

<sup>7</sup> Remington Rand and the Collector have executed bilateral waivers of the Constitutional prescriptive period, *supra*, under which this dispute pends, in the broadened trajectory of the State's attempted reach, until decision of Halliburton's case here on appeal.

<sup>8</sup> Par. IV, Record, p. 58; Appellant's Jurisdictional Statement, pages 10-11.

<sup>9</sup> *State v. J. Watts Kearney & Sons*, 181 La. 554, 160 So. 77; *Claiborne Sales Co. v. Collector*, 233 La. 1061, 99 So. 2d 345.

<sup>10</sup> *Fontenot v. S.E.W. Oil Corporation*, 232 La. 1014, 95 So. 2d 638, is not pertinent to Remington Rand's position at this stage of its controversy with the State of Louisiana, because of fact differences and lack of duality of taxes imposed.

## NECESSITY FOR THIS COURT'S DECISION OF THE ISSUE.

We believe that the Louisiana Supreme Court's attempt to distinguish *State of Alabama v. Bay Towing and Dredging Co., Inc.*,<sup>11</sup> is incorrect. That decision seems to us to posture essentially the same issues as are involved here in a correct constitutional resolution thereof.<sup>12</sup> Otherwise there would not exist the "equality" which this Court has mandated for there to be constitutional validity of such a tax.<sup>13</sup> We see no decision of this Court, though, which says with specificity that there is need for equality between sales and use taxes so as to avoid squarely discrimination against interstate commerce. In that respect *Henneford v. Silas Mason, supra*, in no way justifies a use tax broader than its related tax impinging its heavier impact upon interstate commerce. Such a burden appears by analogy to be illegal.<sup>14</sup> The decision appealed from involves an encroachment upon fundamental principles in such an increasingly important national business climate as to outreach the boundaries of Appellant's single interest. The issues here, therefore, necessitate enunciation of guidance which only this Court can express.

## CONCLUSION.

It is submitted that the issues presented by the appeal are very substantial, involve far reaching and nationally

<sup>11</sup> 265 Ala. 282, 90 So. 2d 743.

<sup>12</sup> See Appellant's Jurisdictional Statement, pages 8, 12 et seq.

<sup>13</sup> *Henneford v. Silas Mason Company*, 300 U.S. 577.

<sup>14</sup> *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450; *Memphis Steam Laundry v. Stone*, 342 U.S. 380; *Walling v. Michigan*, 116 U.S. 446.

important questions of serious constitutional import not squarely passed upon by this Court heretofore, all in a climate of judicial conflict among several of the states. We join, therefore, with Appellant in requesting that this cause be fully heard, considered and determined.

Respectfully submitted,

CICERO C. SESSIONS,

1333 National Bank of Comm. Bldg.,  
New Orleans 12, La.

(Attorney for Sperry Rand  
Corporation),

AMICUS CURIAE.

#### **PROOF OF SERVICE.**

I, Cicero C. Sessions, Amicus Curiae herein, and a member of the bar of the Supreme Court of the United States, do hereby certify that I have served a copy of this brief on Honorable Roland Coreham, Collector of Revenue of the State of Louisiana (successor in office to James S. Reily and Robert L. Roland, prior parties hereto), Appellee in connection with this appeal, by mailing same in the United States mail, postage prepaid, to his counsel of record, Honorable Chapman L. Sanford, at his office in the Capitol Annex Building, Baton Rouge, Louisiana, and that I have served a copy of this brief on Halliburton Oil Well Cementing Company, Appellant in connection with this appeal, by mailing same in the United States mail, postage prepaid,

to its counsel for record, Messrs. C. Vernon Porter and Benjamin B. Taylor, Jr., at their office at 1100 Louisiana National Bank Building, Baton Rouge, Louisiana, all on this 17th day of August, 1961.

CICERO C. SESSIONS.

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JAMES H. BROWNING, Clerk

SUPREME COURT

**Supreme Court of the United States**

OCTOBER TERM, 1961

No. 204

HALLIBURTON OIL WELL CEMENTING COMPANY,  
Appellant

v.

JAMES S. REILY, COLLECTOR OF REVENUE,  
STATE OF LOUISIANA (Since Succeeded By  
Robert L. Roland, Who Was Duly Succeeded  
by Roland Coereham),

Appellee

**ON APPEAL FROM THE SUPREME COURT  
OF THE  
STATE OF LOUISIANA**

**BRIEF OF  
CHICAGO BRIDGE & IRON COMPANY,  
AS AMICUS CURIAE,  
IN SUPPORT OF THE  
JURISDICTIONAL STATEMENT**

ALBERT L. HOPKINS

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FREDERIC W. HICKMAN

HOPKINS, SUTTER, OWEN, MULROY  
& WENTZ

August 15, 1961

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1961

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No. 264

---

HALLIBURTON OIL WELL CEMENTING COMPANY,  
Appellant

v.

JAMES S. REILY, COLLECTOR OF REVENUE,  
STATE OF LOUISIANA (Since Succeeded by  
Robert L. Roland, Who Was Duly Succeeded  
by Roland Coereham),

Appellee

---

**ON APPEAL FROM THE SUPREME COURT  
OF THE  
STATE OF LOUISIANA**

---

**BRIEF OF  
CHICAGO BRIDGE & IRON COMPANY,  
AS AMICUS CURIAE,  
IN SUPPORT OF THE  
JURISDICTIONAL STATEMENT**

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**THE ISSUE**

This brief is limited to the single issue which the appellant designates as the "Labor and Shop-Overhead Phase" of this case.

With respect to articles manufactured by appellant in Oklahoma, the Supreme Court of Louisiana has held the

Louisiana Sales Tax Law to impose a use tax which is admittedly greater than the tax which would have been imposed by such Law with respect to such articles if they had been manufactured by appellant in Louisiana. In so holding, the Supreme Court of Louisiana has rejected appellant's contention that the Louisiana Sales Tax Law, so construed, is invalid because it constitutes an unconstitutional discrimination against interstate commerce, in violation of the Interstate Commerce Clause (Article I, Sec. 8, Clause 3) and the Fourteenth Amendment of the Constitution of the United States.

### **The Interest of Chicago Bridge & Iron Company in This Issue**

Appellant Halliburton Oil Well Cementing Company fabricates in its shops in Oklahoma truck-borne equipment which it uses in Louisiana but does not sell.<sup>1</sup> Chicago Bridge & Iron Company (herein called "Chicago Bridge") fabricates in its shops in Alabama and Illinois steel plates and other parts for oil storage tanks and other large structures which it uses in the erection of those structures in Louisiana but does not sell.<sup>2</sup>

Halliburton paid use taxes upon the cost of the materials which it had incorporated in equipment used in Louisiana,

1 Jurisdictional Statement, page 9.

2 Chicago Bridge as a contractor is a user rather than a seller of these materials, in accordance with the provision of Article 2-47 of the Louisiana Sales and Use Tax Regulations that "contractors engaged in constructing or improving real property, whether on a lump-sum or a cost-plus basis, are deemed to be purchasers and consumers of the materials used by them." See Commerce Clearing House Louisiana Tax Reporter, Paragraph 60-207.



but Appellee demanded and Halliburton paid under protest additional use taxes upon the labor and shop overhead of Halliburton attributable to fabricating this equipment outside of Louisiana.<sup>3</sup> Similarly, Chicago Bridge has paid use taxes upon the cost of materials purchased by it outside of Louisiana, and Appellee has given notice that he proposes to assess additional use taxes upon the costs incurred by Chicago Bridge in fabricating these materials outside of Louisiana. Chicago Bridge has filed a protest against the proposed assessment, and assessment has been withheld by agreement pending final disposition of this case, although Appellee has not committed himself to abide by the result of this case.

The Appellee has stipulated in this proceeding, and it is equally true with respect to Chicago Bridge & Iron Company, that if the taxpayer had purchased its materials, operated its shops and incurred its fabricating expenses in Louisiana, "there would have been a sales tax due to the State of Louisiana upon the cost of the materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead."<sup>4</sup>

### **The Importance of the Issue**

The amount of additional use taxes which the Appellee proposes to assess upon fabricating costs incurred outside of Louisiana by Chicago Bridge between December 1, 1955 and June 30, 1959, is \$61,726.41. If Appellee's position

<sup>3</sup> Jurisdictional Statement, pages 9 and 10; see also page 51 (opinion of Supreme Court of Louisiana, 241 La. 67, 127 So. 502, 504).

<sup>4</sup> Stipulation, par. IV, Record, p. 58, quoted on page 10 of Jurisdictional Statement.

is correct, additional use taxes amounting to approximately \$21,500.00 accrued in the period from July 1, 1959 through June 30, 1961, and such taxes continue to accrue.

If Louisiana can tax Chicago Bridge on the cost of fabricating materials outside of the State, without taxing the cost of similar fabrication done in Louisiana, then other states can do likewise. The resulting costs to Chicago Bridge would be very substantial and in those states in which Chicago Bridge has no fabricating shops it would be placed at severe competitive disadvantage with respect to local businesses, which would pay no tax on fabricating costs.

## ARGUMENT

It is stipulated that Louisiana seeks to treat Halliburton and others similarly situated differently than it treats local concerns who do the same things.<sup>5</sup> The Supreme Court of Louisiana says that this difference does not amount to discrimination because "the proper comparison would be between the use tax on the assembled equipment and a sales tax on the same equipment if it were sold."<sup>6</sup> On the contrary, the comparison suggested by the court is wholly improper. The assembled equipment was, in fact, *not* sold by Halliburton. The absence of discrimination against Halliburton vis-a-vis local competitors who *sell* assembled equipment is immaterial. The damaging discrimination exists with respect to local competitors who, like Halliburton, do *not* sell, but who, unlike Halliburton, fabricate in Louisiana. The cases that uphold non-discriminatory taxation of interstate commerce do not determine the presence or absence of discrimination by comparing the treatment of wholly unlike transactions. On the contrary, their plain teaching is that the determination must be made by comparing the taxation of an interstate transaction with the taxation of an identical transaction carried out entirely within the taxing state. If a State wishes to tax "the stranger from afar" in respect of what he does outside of the State, it must collect no greater toll from him than it collects from one of its own citizens who does the same

5 *Ibid.*

6 Jurisdictional Statement, page 64 (opinion of the Supreme Court of Louisiana, 241 La. 67, 127 So. 2d 502, 510).

things within its borders.<sup>7</sup> This standard of equality Louisiana has stipulated that it does not meet.

Use taxes with respect to articles moving in interstate commerce have been sustained as complements to sales taxes that do not. The two taxes can be complementary only if the tax imposed upon the use of goods bought at a given price outside of the taxing State is the same as that imposed upon the sale or purchase of identically priced goods within that state.<sup>7</sup> Their complementary character will be lost if one tax is based in part upon values added to goods by the purchaser thereof after his purchase while the other tax is computed without reference to such values. Use taxes fall upon articles moving into the taxing state in interstate commerce and they have been held non-discriminatory only where they are balanced by sales taxes on articles acquired locally — in instances where, in the language of Justice Cardozo, “the sum is the same when the reckoning is closed.”<sup>8</sup>

In the instant case the sum is *not* the same when the reckoning is closed. Halliburton's competitors who fabricate the equipment involved in Louisiana pay a tax only on the price paid by them for component parts of that equipment. Halliburton pays an additional tax on the cost attributable to fabrication and assembly — an additional tax which is directly attributable to and measured by activity occurring outside the jurisdiction of Louisiana.

7 See *Henneford et al. v. Silas Mason Co., Inc., et al.* (1937), 300 U.S. 577, 584, 57 Sup. Ct. 524, 527, 81 L. ed. 814, 819, and the cases cited in Mr. Justice Cardozo's opinion in that case.

8 *Henneford et al. v. Silas Mason Co., Inc. et al., supra*, footnote 7, at p. 584.

## CONCLUSION

We believe that a substantial federal question of great moment to large numbers of taxpayers has been decided erroneously by the Supreme Court of Louisiana and, accordingly, we ~~use~~ this Court to retain jurisdiction of Halliburton's appeal and to reverse the judgment from which that appeal has been taken.

Respectfully submitted,

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August 15, 1961

## PROOF OF SERVICE

I, ALBERT L. HOPKINS, one of the attorneys for Chicago Bridge & Iron Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Brief of Chicago Bridge & Iron Company, as Amicus Curiae, In Support of the Jurisdictional Statement, upon the several parties to this appeal as follows:

(1) On Roland Coereham, Collector of Revenue of the State of Louisiana (and successor in office to James S. Reily and Robert L. Roland, earlier parties hereto), Appellee in this proceeding, by mailing on August 15, 1961 a typewritten copy in a duly addressed envelope, with air mail postage prepaid, and by mailing subsequently, on August 17, 1961, a printed copy in a duly addressed envelope with air mail and registered mail postage prepaid, to his counsel of record, Chapman L. Sanford, at the Capitol Annex Building, Baton Rouge, Louisiana.

(2) On Halliburton Oil Well Cementing Company, Appellant in this proceeding, by mailing on August 15, 1961 a typewritten copy in a duly addressed envelope, with air mail postage prepaid, and by mailing subsequently, on August 17, 1961, a printed copy in a duly addressed envelope with air mail and registered mail postage prepaid, to its counsel of record, Benjamin B. Taylor, Jr., at 1100 Louisiana National Bank Building, Baton Rouge, Louisiana.

(3) On Thomas Jordan, Inc., amicus curiae in this proceeding, by mailing on August 17, 1961 a printed copy in a duly addressed envelope, with air mail and registered mail postage prepaid, to its attorney of

record, Charles D. Marshall, at 1122 Whitney Building,  
New Orleans, Louisiana.

.....  
ALBERT L. HOPKINS,  
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— Attorney for Chicago Bridge &  
Iron Company, Amicus Curiae



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JAMES K. BROWNING, Clerk

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1961

No. ~~23~~ 24

HALLIBURTON OIL WELL CEMENTING COMPANY,  
*Appellant,*

*v.*

JAMES S. REILY, COLLECTOR OF REVENUE,  
STATE OF LOUISIANA (SINCE SUCCEEDED BY  
ROBERT L. ROLAND, WHO WAS DULY SUCCEEDED  
BY ROLAND COCREHAM),

*Appellee.*

**On Appeal From The Supreme Court of the  
State of Louisiana**

**MOTION TO DISMISS ON BEHALF OF THE  
COLLECTOR OF REVENUE**

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1961

**No. 264**

**HALLIBURTON OIL WELL CEMENTING COMPANY,**  
*Appellant,*

*v.*

**JAMES S. REILY, COLLECTOR OF REVENUE,  
STATE OF LOUISIANA (SINCE SUCCEEDED BY  
ROBERT L. ROLAND, WHO WAS DULY SUCCEEDED  
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*Appellee.*

**On Appeal From The Supreme Court of the  
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**MOTION TO DISMISS ON BEHALF OF THE  
COLLECTOR OF REVENUE**

Appellee, through undersigned counsel of record,  
respectfully moves that this appeal be dismissed on  
the following grounds:

**I.**

No substantial federal question is raised by the  
facts of this case. The incidence of the Louisiana Use  
Tax is non-discriminatory, and its application in con-  
junction with the Sales Tax achieves equality of ap-  
plication because it is levied upon the use of tangible  
personal property after the property has been with-  
drawn from commerce and has become a part of the  
mass of property within the State of Louisiana.

The combined effect and purpose of the Sales and Use Tax is to insure that all tangible personal property used or consumed in the State of Louisiana bears a 2% tax either at the time of its original sale at retail in the state or at the time of its first use in the state, if a 2% sales tax has not already been paid either to the State of Louisiana or another state.

### **STATEMENT OF THE CASE**

This is an appeal from a final judgment and decree of the Supreme Court of Louisiana.

Appellant paid certain use taxes under protest and instituted suit for recovery thereof, all pursuant to Section 1576 of the Louisiana Revised Statutes of 1950, set out in full in Appendix A of this motion.

The parties stipulated all of the facts in this case and submitted it for decision to the 19th Judicial District Court of the State of Louisiana. In due course the District Court rendered a judgment in favor of the appellant and against the Collector of Revenue who appealed to the Louisiana Supreme Court. Upon argument and review of the record the Louisiana Supreme Court reversed the District Court's decision and rendered judgment in favor of the Collector of Revenue.

### **FACTS**

The facts in this case have been stipulated by the parties. The principle facts are:

Halliburton Oil Well Cementing Company is engaged in the business of servicing oil wells through-

out the United States. Its operations require the use of specialized oil field equipment which Halliburton manufactures, as well as conventional cars, trucks, and airplanes. All of the equipment involved in this case became a part of a mass of property located in Louisiana. None of the property has ever been subjected in any other state to a similar tax.

In its original action the appellant separated its attack on the application of the use tax into three phases; however, the Collector has conceded the first phase entitled *Cost Price vs. Depreciated Value*, and that phase is not presented for decision by this Court.

*The Labor and Shop Overhead Phase* involves equipment manufactured in Duncan, Oklahoma by Halliburton for its own use. Halliburton purchases the component parts and processes, fabricates, and assembles them in its own shops into working units such as oil well cementing trucks and equipment and electrical well logging trucks and equipment. The completed equipment was then brought to Louisiana for use. Halliburton has paid use tax to Louisiana only on the price it has paid for the component parts. The Collector of Revenue assessed additional cost value by including the *pro-rata* share of labor and shop overhead applicable to each item in determining the taxable "cost" at the time the equipment became part of the mass of property in Louisiana.

The Collector has stipulated that had Halliburton manufactured in Louisiana for its own use here, the Collector would not have assessed a 2% tax

on the intangible cost of labor and shop overhead as such. Halliburton would have paid a 2% sales tax only upon the component parts of the equipment at the time of acquiring them.

*The Isolated Sales Phase.* In this phase the Collector sought to impose the use tax upon the value of the property as of the time it became part of the mass of property in Louisiana, even though the property happened to be purchased by Halliburton in another state from persons not ordinarily engaged in the business of selling such property at retail. Halliburton has paid no sales or use tax on this property to any other state.

### ARGUMENT

The law imposing the tax in question is contained in Chapter 2 of Title 47 entitled "Sales Tax." The provisions pertinent to this case read as follows:

R.S. 47:302:

"A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

"(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property *when sold at retail in this state*; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

"(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property *when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state*; provided there shall be no duplication of the tax.

"\* \* \*

"The tax levied in this Section shall be collection from the dealer, as defined herein, shall be paid at the time and in the manner hereinafter provided, and shall be, in addition to all other taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to taxes levied under the provisions of Chapter 3 of Subtitle II of this Title." (Italics Supplied)

R.S. 47:301 (13) (As Amended):

"(13) 'Sales price' means the total amount for which tangible personal property is sold, including any services, except services for financing, that are a part of the sale valued in money, whether paid in money or otherwise, and includes the cost of materials used, labor or service costs, except costs for financing which shall not exceed the legal interest rate and a service charge not to exceed 6% of the amount financed, and losses; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold."

R.S. 47:301 (10):

"(10) 'Retail sale,' or 'sale at retail,' means a sale to a customer or to any person for any pur-



pose other than for resale in the form of tangible personal property, and shall mean and include all such transactions as the collector, upon investigation, finds to be in lieu of sales; provided that sales for resale must be made in strict compliance with the rules and regulations. Any dealer making a sale for resale, which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax."

R.S. 47:301 (3):

"(3) 'Cost price' means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials, used, labor or service cost, transportation charges or any other expenses whatsoever."

R.S. 47:301 (18):

"(18) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business."

R.S. 47:301 (4):

"(4) 'Dealer' includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution or for storage to be used or consumed in this state.

"'Dealer' is further defined to mean:

"(a) every person, who imports, or causes to be imported, tangible personal property from any state or foreign country for sale at retail, for use,



or consumption, or distribution, or for storage to be used or consumed in this state;

“(b) every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein;

“(c) any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this Chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of said tangible personal property;”

“\* \* \*”

R.S. 47:303:

“The tax imposed under R.S. 47:302 shall be collectible from all persons, as hereinafter defined, engaged as dealers, as hereinafter defined.

On all tangible personal property imported, or caused to be imported, from other states or foreign country, and used by him, the “dealer”, as hereinafter defined, shall pay the tax imposed by this Chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this Chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall

thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event."

R.S. 47:305:

\*\*\*

"It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, or tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

The provisions of this Chapter shall not apply in respect to the use, or consumption, or distribution, or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to, or greater than, the amount imposed by this Chapter has been paid in another state, the proof of the payment of such tax to be according to rules and regulations made by the collector of revenue. If the amount of tax paid in another state is not equal to, or greater than, the amount of tax imposed by this Chapter, then the dealer shall pay to the collector of revenue an amount sufficient to make the tax paid in the other state equal to the amount imposed by this Chapter.

"The 'use tax' under this Chapter shall not

apply to tangible personal property owned or acquired in this state, or imported into this state, or held or stored in this state, prior to June 7, 1948; but the 'use tax' will apply to all tangible personal property imported or caused to be imported into this state on or after that date, unless the property has previously borne a sales or use tax in another state, equal to or greater than the tax imposed by this Chapter."

Examination of the Louisiana Sales and Use Tax Statute reveals that Louisiana has accomplished an almost perfect equalization of the 2% tax burden. The 2% sales tax and the 2% use tax when applied consistently as the Collector has applied it in this case will assure that prior to the first use or consumption of any and all tangible personal property in the state, such property will be the subject of a 2% tax burden, either by virtue of its first sale at retail, or by virtue of its first use in the State of Louisiana.

The burden is limited to 2% by virtue of the provision prohibiting the duplication of the sales and use tax. Thus, every person in the state who first uses or consumes tangible personal property is placed on an equal economic basis with every other person using or consuming similar property. There is no chance of avoidance of the 2% sales tax burden upon the first use of such property within the state by any party by virtue of his having acquired the property either within or without the state. All property within the state which has once borne an original 2% tax, whether the sales tax or the use tax, is thereafter subject to the same identical rules. Thus, all tangible personal prop-

erty in the state, all of the users, all of the consumers, all of the merchants, dealers, and vendors, are placed in the same economic position with respect to the taxes imposed by Chapter 2 of Title 47 of the Louisiana Revised Statutes.

Appellant complains that because a taxpayer may reduce his tax burden by manufacturing equipment within Louisiana for his own use, there is necessarily an unconstitutional discrimination against goods which are manufactured outside of the State of Louisiana.

Appellant's premise is erroneous. Under the Louisiana law there are two incidents of taxation:

(a) The sale at retail within the State of Louisiana; and

(b) The moment property brought into the State for use becomes part of the mass property of the State which is considered to be a sale at retail.

In the case of *Fontenot v. S.E.W. Oil Corporation*, 232 La. 1011, 95 So. 2d 638 (1957) the Collector sought to collect a use tax based on the purchase price of an article purchased outside of the State of Louisiana even though the article had declined considerably in value before being brought into the State of Louisiana. The Collector erroneously interpreted the phrase "cost price" to mean the purchase price of the article. After a thorough consideration of the sales tax law, and after quoting R.S. 47:303, the Louisiana Supreme Court held:

“According to this section a person importing an article for use in this state must pay the ‘use tax’ the same as if it had been sold at retail, *and such use shall be considered equivalent to the sale at retail as of the time of importation.* These provisions, along with the others above mentioned, clearly indicate that the ‘use tax’ is to be computed on the retail price the property would have brought when imported—that is, its then value or worth.” (Italics supplied)

In the S.E.W. case the Louisiana Supreme Court pointed up the fundamental purpose of equality of the Louisiana Use Tax. Indeed we are fortunate to have the decision in that case available to assist us in clarifying the issues presented herein. In its opinion the Louisiana Supreme Court pointed out two very important facets of the Louisiana Use Tax—

- (1) That the use tax should be computed upon the value of property at the time it is brought into the state and not upon the original purchase or cost price, and
- (2) That under the statute the use of property is considered to be equivalent to a sale at retail as of the time of importation. Therefore, the tax should be computed on the retail price the property would bring when imported.

The ruling of the Louisiana Supreme Court in the S.E.W. case is the only possible interpretation of our tax statute which can accomplish the Legislature intent to place all the economic interests using or selling tangible personal property in the state upon an equal basis.

It is fundamental that a state lacks competence to tax transactions or property over which it has no jurisdiction.

The Louisiana Supreme Court recognized that rule. Clearly, this State may not collect a tax based upon a sale which occurred outside of Louisiana. The important point being that the tax is based upon the value of property under the facts and circumstances existing as of the taxable moment. That is, when the property is withdrawn from commerce and becomes part of the mass of property within the state. Anything which occurred prior to that taxable moment, such as the nature of the transaction under which the property was acquired, is purely incidental and totally irrelevant and immaterial to the basis upon which the Louisiana Use Tax is founded. The basis is simply the value of the property as it is at the moment of taxation.

Where an item is manufactured in Louisiana and is never sold at retail there is no taxable moment in Louisiana except for the sale at retail of the component parts for which the manufacturer has paid sales tax. A taxpayer choosing to produce equipment within Louisiana for its own use must consider more than the 2% saving on the additional cost of a similar item purchased at retail or imported into the State for use. By virtue of establishing a manufacturing plant within Louisiana a taxpayer immediately subjects himself to additional ad valorem taxes, an increase of income taxes by virtue of an increase in the property



and wage factor, and if a taxpayer is a corporation, he has subjected himself to additional franchise taxes. The economic and competitive position of a taxpayer manufacturing in Louisiana is wholly different from that of a taxpayer who either purchases similar equipment at retail within the State for use or who imports similar equipment from outside the State for use within the State.

The situation of which the appellant complains is not an interstate commerce tax problem but a problem of management in locating and so arranging its operations in such a manner as to reduce its cost of operations to a minimum.

Appellant complains that it is because Halliburton produces its equipment outside of the State of Louisiana and ships it in interstate commerce into Louisiana that Louisiana subjects it to an additional tax upon the shop overhead and labor. This is not so. *Louisiana taxes no one because they are engaged in interstate commerce. Louisiana taxes no one because they are engaged in production outside of the State of Louisiana.* In fact, it is impossible for Louisiana to do so. The tax in this case is imposed because at the taxable moment the cost of the item that has become part of the mass of property within the State included all expenses of construction. The tax is not imposed "because manufacture occurred outside Louisiana" but because appellant brought into Louisiana for use in Louisiana tangible personal property which had not already borne a similar tax.



Halliburton did not bring into Louisiana component parts of equipment but brought into the State of Louisiana a completed item assembled and ready for use. When that item was withdrawn from commerce and became a part of the property within the State of Louisiana, it had a greater cost than the unassembled items. It is upon the cost at the moment of taxation that the Collector has assessed the 2% use tax. Commerce is not involved.

Appellant's complaint that Louisiana taxes a casual sale simply because it occurred outside the State is not well taken. Louisiana taxes *no sales outside of the State*, casual or otherwise, and clearly has no jurisdiction to do so. The taxable incident is the property coming into the State for use and becoming a part of the mass of property within the State. Louisiana is not concerned with what occurred prior to that time. The purpose of the tax is to insure that all property *within* the State and out of commerce bears a 2% sales or use tax at the moment of its first use in Louisiana. No other similar tax has ever been paid on this item, if it had, Louisiana would not tax the transaction. A casual sale within the State of Louisiana may be exempted without discrimination because that item will *always* have already borne a 2% sales or use tax.

If we are to accept the premise expounded by the appellant virtually every payer of *sales* tax within the State of Louisiana would have the same complaint and could argue that the 2% sales tax includes

tax on labor and overhead and that any person who produces a similar item within the State for its own use, paying the sales tax only upon the component parts, could avoid the tax upon the labor and overhead, and thus the payer of sales tax is discriminated against.

Nothing is taxed because of what occurred outside Louisiana. The tax is imposed solely by virtue of what occurred in Louisiana after commerce was at an end.

This Court has clearly explained its position in that connection in *Hennéford v. Silas Mason Company*, 300 U.S. 577, 57 S. Ct. 524 (1937). We quote that decision in its entirety.

— "Mr. Justice CARDOZO delivered the opinion of the Court.

"A statute of Washington taxing the use of chattels in that state is assailed in this suit as a violation of the commerce clause (Constitution of the United States, art. 1, § 8) in so far as the tax is applicable to chattels purchased in another state and used in Washington thereafter.

"Plaintiffs (appellees in this court) are engaged either as contractors or as subcontractors in the construction of the Grand Coulee Dam on the Columbia river. In the performance of that work they have brought into the state of Washington machinery, materials, and supplies, such as locomotives, cars, conveyors, pumps, and trestle steel, which were bought at retail in other states. The cost of all the articles with

transportation expenses added was \$921,189.34. Defendants, the Tax Commission of Washington (appellants in this court) gave notice that plaintiffs had become subject through the use of this property to a tax of \$18,423.78, 2 per cent of the cost, and made demand for payment. A District Court of three judges, organized in accordance with section 266 of the Judicial Code (28 U.S.C. § 380 [28 U.S.C.A. § 380]), adjudged the statute void upon its face, and granted an interlocutory injunction, one judge dissenting. 15 F. Supp. 958. The case is here upon appeal. 28 U.S.C. § 380 (28 U.S.C.A. § 380).

"Chapter 180, page 706 of the Laws of Washington for the year 1935, consisting of twenty titles, lays a multitude of excise taxes on occupations and activities. Only two of these taxes are important for the purposes of the case at hand, the 'tax on retail sales,' imposed by title 3, and the 'compensating tax,' imposed by title 4 on the privilege of use. Title 3 provides that after May 1, 1935, every retail sale in Washington, with a few enumerated exceptions, shall be subject to a tax of 2 per cent of the selling price. Title 4, with the heading 'compensating tax,' provides (sections 31, 35) that there shall be collected from every person in the state 'a tax or excise for the privilege of using within this state any article of tangible personal property purchased subsequent to April 30, 1935,' at the rate of 2 per cent of the purchase price, including in such price the cost of transportation from the place where the article was purchased. If those provisions

stood alone, they would mean that retail buyers within the state would have to pay a double tax, 2 per cent upon the sale and 2 per cent upon the use. Relief from such a burden is provided in another section (section 32) which qualifies the use tax by allowing four exceptions. Only two of these exceptions (b and c) call for mention at this time. Subdivision (b) provides that the use tax shall not be laid unless the property has been bought at retail. Subdivision (c) provides that the tax shall not apply to the 'use of any article of tangible personal property the sale or use of which has already been subjected to a tax equal to or in excess of that imposed by this title whether under the laws of this state or of some other state of the United States.' If the rate of such other tax is less than 2 per cent, the exemption is not to be complete (section 33), but in such circumstances the rate is to be measured by the difference.

"The plan embodied in these provisions in neither hidden nor uncertain. A use tax is never payable where the user has acquired property by retail purchase in the state of Washington, except in the rare instances in which retail purchases in Washington are not subjected to a sales tax. On the other hand, a use tax is always payable where the user has acquired property by retail purchase in or from another state, unless he has paid a sales or use tax elsewhere before bringing it to Washington. The tax presupposes everywhere a retail purchase by the user before the time of use. If he has manufactured the chattel for himself, or has received it from the manufacturer as a legacy

or gift, he is exempt from the use tax, whether title was acquired in Washington or elsewhere. The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?

"The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, nondiscriminatory in its operation, when they have become part of the common mass of property within the state of destination. *Wilcoil Corp. v. Com. of Pennsylvania*, 294 U.S. 169, 175, 55 S. Ct. 358, 360, 79 L.Ed. 838; *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 453, 38 S. Ct. 373, 62 L.Ed. 827; *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 575, 30 S. Ct. 578, 54 L.Ed. 883; *American Steel & Wire Co. v. Speed*, 192 U.S.

500, 519, 24 S. Ct. 365, 48 L.Ed. 538; *Woodruff v. Parham*, 8 Wall, 123, 137, 19 L.Ed. 382. This is so, indeed, though they are still in the original packages. *Sonneborn Bros. v. Curton*, 262 U.S. 506, 43 S. Ct. 643, 67 L.Ed. 1095; *American Steel & Wire Co. v. Speed*, *supra*; *Woodruff v. Parham*, *supra*. For like reasons they may be subjected, when once they are at rest, to a nondiscriminatory tax upon use or enjoyment. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 267, 53 S. Ct. 345, 349, 77 L.Ed. 730, 87 A.L.R. 1191; *Edelman v. Boeing Air Transport, Inc.* 289 U.S. 249, 252, 53 S. Ct. 591, 592, 77 L.Ed. 1155; *Monamotor Oil Co. v. Johnson* 292 U.S. 86, 93, 54 S. Ct. 575, 578, 78 L.Ed. 1141. The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. *Nashville, C. & St. L. Ry. Co. v. Wallace*, *supra*; *Bromley v. McCaughn*, 280 U.S. 124, 136-138, 50 S.Ct. 46, 48, 74 L.Ed. 226; *Burnet v. Wells*, 289 U.S. 670, 678, 53 S.Ct. 761, 764, 77 L.Ed. 1439. A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively. *Id.* Calling the tax an excise when it is laid solely upon the use (*Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 49 P. (2d) 14) does not make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership. 'A nondiscriminatory tax upon local sales \* \* \* has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than



a general property tax to which all those enjoying the protection of the state may be subjected.' *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147, 153, 52 S.Ct. 340, 341, 76 L.Ed. 673. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate. *Nashville, C. & St. L. Ry. Co. v. Wallace*, *supra*; *Edelman v. Boeing Air Transport, Inc.* *supra*; *Monamotor Oil Co. v. Johnson*, *supra*. Cf. *Vancouver Oil Co. v. Henneford*, *supra*.

"The case before us does not call for approval or disapproval of the definition of use or enjoyment in the rules of the Commission. Those rules inform us that 'property is put to use by the first act after delivery is completed within the state by which the article purchased is actually used or is made available for use with intent actually to use the same within the state. The term "made available for use" means and includes the exercise of any right or power over tangible personal property preparatory to actual use within the state, such as keeping, storing, withdrawing from storage, moving, installing or performing any act by which dominion or control over the property is assumed by the purchaser.' A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself. If the rules are too drastic in that respect or others, the defect is unimportant in relation to this case.



Here the machinery and other chattels subjected to the tax have had continuous use in Washington long after the time when delivery was over. The plaintiffs are not the champions of any rights except their own.

"The tax upon the use after the property is at rest is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them.

"Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. This is true where the offsetting tax became payable to Washington by reason of purchase or use within the state. It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there. No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Everyone who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington.

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel sub-

jected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local. 'There is no demand in [the] Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power.' *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 480, 52 S.Ct. 631, 634, 76 L.Ed. 1232, 84 A.L.R. 831. If the sales tax were abolished, the buyer in Washington would pay at once upon the use. He would have no longer an offsetting credit. While the sales tax is in force, he pays upon the sale, and pays at the same rate. For the owner who uses after buying from afar the effect is all one whether his competitor is taxable under one title or another. This common sense conclusion has ample precedent behind it. Alabama laid a tax on the sale of spirituous liquors, the products of sister states. Comparing the tax with others applicable to domestic products, the court upheld the statute. The methods of collection were different, but the taxes were complementary and were intended to effect equality. *Hinson v. Lott*, 8 Wall. 148 19 L.Ed. 387. Louisiana laid a tax in lieu of local taxes on rolling stock operated within the state, but belonging to corporations domiciled elsewhere. The court compared the tax with the local taxes upon residents, and found discrimination lack-

ing. *General American Tank Car Corp. v. Day*, 270 U.S. 367, 372, 373, 46 S.Ct. 234, 235, 70 L.Ed. 635. South Carolina laid a tax on the storage of gasoline brought from other states and held for use in local business. The statute (Act S.C. April 4, 1930, 36 St. at Large, p. 1390) was interpreted by the state court, *Gregg Dyeing Co. v. Query*, 166 S.C. 117, 164 S.E. 588, 593, as covering 'all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes.' Upon comparison of all the statutes, the impost was upheld. The taxpayers had 'failed to show that, whatever distinction there existed in form, there was any substantial discrimination in fact.' *Gregg Dyeing Co. v. Query*, *supra*.

"*Baldwin v. G. A. F. Seelig, Inc.* 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032, 101 A.L.R. 55, is invoked by appellees as decisive of the controversy, but the case is far apart from this one. There a statute of New York had made provision for a minimum price to be paid by dealers in milk to producers in that state. Cf. *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469; *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 55 S.Ct. 7, 79, L.Ed. 259. The same statute provided that when milk from another state had been brought into New York, the dealer should be prohibited from selling it at any price unless in buying the milk from the out-of-state producer he had paid the price that would be necessary if he had bought within the state. New York was attempting to project its legislation within the borders

of another state by regulating the price to be paid in that state for milk acquired there. She said in effect to farmers in Vermont: Your milk cannot be sold by dealers to whom you ship it in New York unless you sell it to them in Vermont, at a price determined here. What Washington is saying to sellers beyond her borders is something very different. In substance what she says is this: You may ship your goods in such amounts and at such prices as you please, but the goods when used in Washington after the transit is completed, will share an equal burden with goods that have been purchased here.

"We are told that a tax upon the use, even though not unlawful by force of its effects alone, is vitiated by the motives that led to its adoption. These motives cause it to be stigmatized as equivalent to a protective tariff. But motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful. *Magnano Co. v. Hamilton*, 292 U.S. 40, 44, 54 S.Ct. 599, 601, 78 L.Ed. 1109; *Fox v. Standard Oil Co.*, 294 U.S. 87, 100, 101, 55 S.Ct. 333, 338, 339, 79 L.Ed. 780. Least of all will they be permitted to accomplish that result when equality and not preference is the end to be achieved. Catch words and labels, such as the words 'protective tariff,' are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard. A tariff, whether protective or for revenue, burdens the very act of importation, and if laid by a state upon its commerce with another is equally unlawful whether

protection or revenue is the motive back of it. But a tax upon use, or what is equivalent for present purposes, a tax upon property after importation is over, is not a clog upon the process of importation at all, any more than a tax upon the income or profits of a business. The contention would be futile that Washington in laying an ownership tax would be doing a wrong to nonresidents in allowing a credit for a sales tax already borne by the owner as a result of the same ownership. To contend this would be to deny that a state may develop its scheme of taxation in such a way as to rid its exactions of unnecessary oppression. In the statute in dispute such a scheme has been developed with sedulous regard for every interest affected. Yet a word of caution should be added here to avoid the chance of misconception. We have ~~not~~ meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to ~~other~~ states. A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination. This statute by its framework avoids that possibility. The offsetting allowance has been conceded, whether the concession was necessary or not, and thus the system has been divested of any sem-

blance of inequality or prejudice. A taxing act is not invalid because its exemptions are more generous than the state would have been free to make them by exerting the full measure of her power.

“Finally, there is argument that the tax now in question, though in form upon the use, was in fact upon the foreign sale, and not upon the use at all, the form being a subterfuge. The supposed basis for that argument is a reading of the statute whereby the use shall not be taxable if the chattel was manufactured by the user or received as a legacy or acquired in any way except through the medium of purchase, and a retail one at that. But the fact that the Legislature has chosen to lay a tax upon the use of chattels that have been bought does not make the tax upon the use a tax upon the sale. One could argue with as much reason that there would be a tax upon the sale if a property tax were limited to chattels so acquired. A legislature has a wide range of choice in classifying and limiting the subjects of taxation. *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237, 10 S. Ct. 533, 33 L.Ed. 892; *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159, 50 S.Ct. 310, 313, 74 L.Ed. 775. The choice is as broad where the tax is laid upon one or a few of the attributes of ownership as when laid upon them all. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 158, 159, 31 S.Ct. 342, 55 L.Ed. 389, Ann. Cas. 1912B, 1312. True, collections might be larger if the use were not dependent upon a prior purchase by the



user. On the other hand, economy in administration or a fairer distribution of social benefits and burdens may have been promoted when the lines were drawn as they were. Such questions of fiscal policy will not be answered by a court. The Legislature might make the tax base as broad or as narrow as it pleased.

"The interlocutory injunction was erroneously granted, and the decree must be Reversed."

### CONCLUSION

The Louisiana sales and use tax are complementary taxes designed to assure that prior to its first use within the State all items of tangible personal property bear a 2% tax either within the State of Louisiana or in another State. The achievement of equality is its theme. If a similar tax has been paid anywhere, there is no tax due to the State of Louisiana. The 2% sales or use tax never is applied prior to the tangible personal property being withdrawn from commerce, and it is not until such property becomes part of the mass of the property within the State of Louisiana that the tax applies. An item never bears more than 2% tax because a credit is allowed for a similar tax paid upon the item to another State. Under such circumstances we respectfully urge that there can be no discrimination against interstate commerce, that there is no substantial Federal question involved in this case. That the appeal



of Halliburton Oil Well Cementing Company should  
be dismissed at its costs.

Respectfully submitted,

CHAPMAN L. SANFORD  
Trial Counsel

JOHN B. SMULLIN

Attorney of Record upon  
whom Service may be made  
403 Capitol Annex  
Baton Rouge, Louisiana

## APPENDIX "A"

### § 1576. Payment of tax under protest; remedy at law for recovery

A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Sub-title. The person resisting the payment of any amount found due by the collector or of enforcement of any provisions of this Sub-title, shall pay the amount found due to the collector and at that time shall give the collector notice of his intention to file suit for the recovery thereof. Upon receipt of this notice the amount paid shall be segregated and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds segregated shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the collector to the date of refund.

This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Sub-title, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, serv-

ice of process upon the Collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

This Section shall be construed to provide a legal remedy in the state or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress of the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

Upon request of a person and proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, such person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.

**PROOF OF SERVICE**

I, John B. Smullin, attorney of record for appellee in this matter and a member of the bar of this Court, do certify that a copy of this brief was served upon appellant by depositing same this day of August, 1961, in a United States post office, first-class postage prepaid, addressed to the Honorable Benjamir B. Taylor, Jr., attorney of record for appellant, at 11th Floor, Louisiana National Bank Building, Baton Rouge, Louisiana.

John B. Smullin

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FILED

AUG 28 1961

JAMES R. BROWNING, Clerk

IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1962

No. ~~23~~ 24

**HALLIBURTON OIL WELL CEMENTING  
COMPANY,**

**Appellant,**

*versus*

**JAMES S. REILY,**

**COLLECTOR OF REVENUE, STATE OF LOUISIANA**  
(Since Succeeded by Robert L. Roland, Who Was Duly  
Succeeded by Roland Cocreham),

**Appellee.**

**On Appeal from the Supreme Court of the  
State of Louisiana.**

**AMICUS CURIAE BRIEF BY ATTORNEY FOR  
AMERICAN CAN COMPANY**

**BEN R. MILLER**

P. O. Box 1588

Baton Rouge, Louisiana

(Attorney for American Can Company)

*Amicus Curiae*

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1961

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**No. 264**

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**HALLIBURTON OIL WELL CEMENTING  
COMPANY,**

**Appellant,**

*versus*

**JAMES S. REILY,**

**COLLECTOR OF REVENUE, STATE OF LOUISIANA**

**(Since Succeeded by Robert L. Roland, Who Was Duly  
Succeeded by Roland Coereham),**

**Appellee.**

---

**On Appeal from the Supreme Court of the  
State of Louisiana.**

---

**AMICUS CURIAE BRIEF BY ATTORNEY FOR  
AMERICAN CAN COMPANY**

---

*May It Please the Court:*

**THE QUESTION**

The issue here is whether or not the State of Louisiana  
may levy a use tax which discriminates against a business



which crosses state lines, while the state levies a lesser tax on the identical transaction if there is no interstate movement.

Such unequal taxation discriminates against interstate commerce by providing a direct commercial advantage to local business; the additional tax burden upon the multi-state operator is a direct interference with the free flow of interstate commerce; and it is therefore the taxpayer's position that such discriminatory taxation is prohibited by the interstate commerce clause of the Constitution of the United States.

The Louisiana Supreme Court has held that this discrimination is not unconstitutional because it is merely "incidental." See Jurisdictional Statement pp. 27-30.

### **AMERICAN CAN COMPANY HAS A DIRECT INTEREST IN THIS CASE**

American Can Company, a New Jersey corporation with its principal office in New York City, manufactures and fabricates can-manufacturing machinery as well as replacement parts for this machinery, and can-closing machinery at its machine shops in the states of New York, New Jersey, Ohio, and California. The can-making machinery and the replacement parts used in that machinery are produced by American Can for its own use in can-making plants throughout the country, including Louisiana. All raw materials for the manufacture of the can-making machinery and the replacement parts used in that machinery are purchased outside Louisiana. The manufacturing process takes place entirely outside

Louisiana. At its machine shops situated entirely in other states, American Can Company transforms the materials purchased by it into the finished machinery and parts, some of which are subsequently shipped by American Can Company to its own plant in New Orleans. American Can Company does not sell the can-making machinery, but uses it in its own plants, one of which is situated in New Orleans, Louisiana.

The Louisiana Collector concedes that, if American Can Company made the can-manufacturing machinery in Louisiana, it would be obliged to pay a sales tax on the raw materials which were used in making that machinery, but there would be no sales or use tax upon the labor-and-shop-overhead element of the cost of the finished machinery. However, the Louisiana Collector takes the position that, if American Can Company fabricates this machinery in New York, New Jersey, Ohio, or California, and **not** in Louisiana, Louisiana may levy a two per cent use tax upon this labor-and-shop-overhead element of cost. If the machinery were fabricated in Louisiana, there would be no 2% tax on the labor-and-shop-overhead element. If the machinery is fabricated outside Louisiana, and then transported to Louisiana in interstate commerce, then Louisiana asserts its right to collect the tax in full. It is submitted that this is open discrimination against interstate commerce.<sup>o</sup>

American Can Company has paid the amount of this discriminatory use tax to the Louisiana Collector, under protest, and has entered into an agreement that it would abide by the final decision of this Court, in the present *Halliburton Oil Well Cementing Company* case. Therefore, American Can Company has a direct interest in the present litigation.

## ARGUMENT

The jurisprudence in point has been adequately presented in the Jurisdictional Statement and in other briefs *amicus curiae*. The issue is whether a state can impose a burden upon an interstate or multi-state transaction while simultaneously exempting an identical transaction which is purely intrastate from that tax burden. Can the state provide immunity from a tax to an intrastate operator who avoids crossing the state's border, and collect that same tax from those who must cross that border because they are engaged in interstate commerce?

In *Best v. Maxwell*, 311 U.S. 454, 61 S.Ct. 335, 85 L.Ed. 275 (1940), this Court said:

"The commerce clause forbids discrimination, whether forthright or ingenious. . . ."

The discrimination in the present case is "forthright." The Louisiana Collector asserts that there is no constitutional barrier to such discriminatory taxation. The Louisiana Supreme Court has upheld him.

In *Henneford v. Silas Mason Company*, 300 U.S. 557, 57 S.Ct. 524, 81 L.Ed. 814 (1936), this Court held that imposition of a use tax upon an interstate transaction was not unconstitutional in a case where the use tax was merely equal to the comparable intrastate sales tax. The validity of the use tax was upheld, we submit, only because the sales tax was equal to the use tax.

The Louisiana Collector asserts that the burden of the

use tax upon an interstate transaction may be greater than the burden of an intrastate sales tax.

It is submitted that this Court should squarely lay down the rule that a state use tax imposed upon an interstate transaction may not be greater than the state sales tax to which it is supposed to be complementary. If, however, this Court interprets the Constitution of the United States to permit a state to levy a use tax on interstate transactions which is more burdensome than the sales tax imposed on an identical intrastate transaction would be, that interpretation of the Constitution should be set forth for the guidance of businessmen who must engage in multi-state operations. In Alabama, Ohio, North Dakota, and California, the use tax cannot be greater than the sales tax because these states adopt the view that otherwise the tax would burden interstate commerce. In Louisiana the use tax can be greater than the sales tax, because the burden upon interstate commerce is said to be merely "incidental."

The issue here is one of broad implication and of importance to American business. It is submitted that the federal question here presented is substantial, and that this Court should note probable jurisdiction of this case and hear it upon its merits on briefs and oral argument.

Respectfully submitted,

BEN R. MILLER

P. O. Box 1588

Baton Rouge, Louisiana

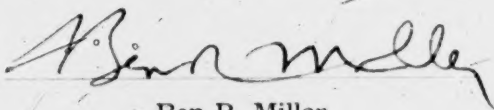
(Attorney for American Can Company)

*Amicus Curiae*

**CERTIFICATE OF CONSENT TO FILING OF AMICUS  
CURIAE BRIEF AND PROOF OF SERVICE**

I, Ben R. Miller, a member of the bar of the Supreme Court of the United States, do hereby certify that consent has been granted by both parties to this cause to filing of a brief, amicus curiae, in this cause on behalf of American Can Company, and I attach to this brief letters evidencing such consent.

I further certify hereby that I have served a copy of this brief on Honorable Roland Cocreham, Collector of Revenue of the State of Louisiana (successor in office to James S. Reily and Robert L. Roland, prior parties hereto), Appellee in connection with this appeal, by mailing same in the United States mail, postage prepaid, to his counsel of record, Honorable Chapman L. Sanford, at his office in the Capitol Annex Building, Baton Rouge, Louisiana, and that I have served a copy of this brief on Halliburton Oil Well Cementing Company, Appellant in connection with this appeal, by mailing same in the United States mail, postage prepaid, to its counsel of record, Messrs. C. Vernon Porter and Benjamin B. Taylor, Jr., at their office at 1100 Louisiana National Bank Building, Baton Rouge, Louisiana, all on this 25th day of August, 1961.



Ben R. Miller

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JAMES R. BROWNING, Clerk

**IN THE**  
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1961** 2

**No. ~~23~~ 24**

**HALLIBURTON OIL WELL CEMENTING  
COMPANY,**

**Appellant,**

***versus***

**JAMES S. REILY,**

**COLLECTOR OF REVENUE, STATE OF LOUISIANA**

**(Since Succeeded by Robert L. Roland, Who Was Duly  
Succeeded by Roland Cocreham),**

**Appellee**

**On Appeal from the Supreme Court of the  
State of Louisiana.**

**BRIEF OF AMICUS CURIAE (REPRESENTING  
HUMBLE OIL & REFINING COMPANY)**

**FORREST M. DARROUGH**

**1216 Main Street**

**Houston, Texas**

***Amicus Curiae***

**(Attorney for Humble Oil &  
Refining Company)**

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1961

---

**No. 264**

---

**HALLIBURTON OIL WELL CEMENTING  
COMPANY,**

**Appellant.**

**VERSUS**

**JAMES S. REILY,**

**COLLECTOR OF REVENUE, STATE OF LOUISIANA**

(Since Succeeded by Robert L. Roland, Who Was Duly  
Succeeded by Rola. I Coecheam),

**Appellee**

---

**On Appeal from the Supreme Court of the  
State of Louisiana.**

---

**BRIEF OF AMICUS CURIAE (REPRESENTING  
HUMBLE OIL & REFINING COMPANY)**

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**THE ISSUE**

The issue here is whether or not a state, through its powers of taxation, may discriminate against the citizen who operates in interstate commerce, and thus provide a direct commercial advantage to local business. **Restated:** Can a state



levy an excise tax upon the privilege of engaging in multi-state business operations, while simultaneously exempting from the same tax the wholly intra-state operator? Can the Louisiana Use Tax, which falls solely upon the use of goods imported into Louisiana from other states, be more burdensome than the Louisiana Sales Tax would be where it falls upon the identical economic operation performed wholly within Louisiana's borders?

**Humble Oil & Refining Company, Represented by Amicus Curiae, Has the Same Controversy with the Louisiana Collector.**

Under contract with Humble, Chicago Bridge and Iron Company produced and fabricated wholly outside Louisiana steel parts for certain field-erected structures for Humble's oil refinery at Baton Rouge, Louisiana. The agreement with Chicago Bridge and Iron requires that Humble reimburse that company for Louisiana Use Tax paid on the fabricated parts thus imported into Louisiana.

If Chicago Bridge and Iron Company had its fabrication shops in Louisiana, it would pay a sales tax on the items of physical equipment which it, as the ultimate consumer thereof, incorporated into its finished product. But, there would be no tax upon the labor-and-shop-overhead element of the cost of fabrication, and there would be no sales tax on transportation costs expended within the State of Louisiana.

Yet, because the labor and-shop-overhead and the transportation costs were expended outside the State of Louisiana, the Louisiana Collector would include these elements in the

tax base. Louisiana would tax the transportation costs and the labor-and-shop-overhead costs solely because they were expended outside Louisiana and, thereafter, the finished products were brought into Louisiana.

This is the same issue which is involved in the case of Halliburton Oil Well Cementing Company, now before this Court on Jurisdictional Statement. In the Halliburton case, the Collector (upheld by the Louisiana Supreme Court) demands the Use Tax on the labor-and-shop-overhead while stipulating that

"If Halliburton had . . . operated . . . at a location within the State of Louisiana . . .

" . . . there would have been no Louisiana Sales Tax or Use Tax upon the Labor and Shop Overhead." o

It is clear that Louisiana would tax this element of cost only because of the interstate movement and the multi-state nature of the business operation.

#### **The Issue is of Substantial Importance.**

In *Memphis Steam Laundry Cleaner, Inc., v. Stone*, 342 U.S. 489, 96 L.Ed. 436, 72 S.Ct. 424 (1952), this Court dealt with an excise tax upon the privilege of soliciting business in Mississippi by an out-of-state concern. This Court said:

"The inclusion of these elements in the tax base results in an increase of approximately \$18,659.95 which Humble, under its contract with Chicago Bridge and Iron Company, will be responsible for if the Collector's position is maintained.

"We hold that the tax before us infringes the Commerce Clause under either interpretation of the operating incidence of the tax.

"The Commerce Clause created the nation-wide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states. The tax imposed in this case made the Mississippi state line into a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause." (96 L.Ed. at p. 441)

In *Spector Motor Service, Inc., v. O'Connor*, 340 U.S. 692, 95 L.Ed. 573, 71 S.Ct. 508 (1951), this Court held unconstitutional a state excise tax upon the privilege of engaging in interstate commerce. In *Best v. Maxwell*, 311 U.S. 454, 61 S.Ct. 335, this Court said that

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. . . ."

Louisiana taxes the interstate operator in a discriminatory manner. If Louisiana may erect a tax barrier at its interstate border lines, other states may do the same, and thus the flow of interstate commerce will be seriously impeded.

## CONCLUSION

It is respectfully submitted that there is need for a decision by this Court determining that a state use tax (falling upon the interstate business operation) cannot be greater than the sales tax would be upon the identical operation which

is wholly intrastate. We respectfully refer this Court to the arguments in the Jurisdictional Statement filed by Halliburton Oil Well Cementing Company, in which we join and concur.

It is further submitted that this Court should note probable jurisdiction in this case and hear the case upon its merits; that, upon such hearing, this Court should reverse the decision of the Louisiana Supreme Court and reiterate that interstate commerce must be free of economic barriers at the state lines.

Respectfully submitted,

FORREST M. DARROUGH

1216 Main Street

Houston, Texas

*Amicus Curiae*

// (Attorney for Humble Oil &  
Refining Company)

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**SUPREME COURT, U. S.**

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**FILED**

**SEP 5 1961**

JAMES J. BROWNING, Clerk

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**October Term, 1961**

**No. 24**

**HALLIBURTON OIL WELL CEMENTING COMPANY,**

**Appellant**

**versus**

**JAMES S. REILY, COLLECTOR OF REVENUE, STATE**

**OF LOUISIANA (Since Succeeded by Robert L. Roland,**

**Who Was Duly Succeeded by Roland Cerreham),**

**Appellee**

**ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF LOUISIANA**

**BRIEF IN REPLY TO MOTION TO DISMISS**

**Filed by Appellant**

**Robert O. Brown,**  
General Counsel for Appellant

**Robert E. Rice,**  
Assistant General Counsel  
Duncan, Oklahoma

**Of Counsel:**

**Laurance W. Brooks  
James R. Fuller  
Charles W. Phillips  
William G. Randolph  
Frank W. Middleton, Jr.  
Robert J. Vandaworker  
Tom F. Phillips**

**C. Vernon Porter  
and**

**Benjamin B. Taylor, Jr.**

**% Taylor, Porter, Brooks,  
Fuller & Phillips, Attys.  
1100 La. Nat'l Bank Bldg.  
Baton Rouge, Louisiana**

**Counsel of Record, Upon  
Whom Service May Be Made**

**Baton Rouge, Louisiana  
September 1, 1961**

IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1961

No. 264

**HALLIBURTON OIL WELL CEMENTING COMPANY,**

Appellant

*versus*

**JAMES S. REILY, COLLECTOR OF REVENUE, STATE  
OF LOUISIANA** (Since Succeeded by Robert L. Roland,  
Who Was Duly Succeeded by Roland Cocreham),

Appellee

---

**ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF LOUISIANA**

---

**BRIEF IN REPLY TO MOTION TO DISMISS**  
Filed by Appellant

---

*May It Please the Court:*

**FIRST: "Separate, But Almost Equal":**

The Louisiana Collector of Revenue argues:

"Louisiana has accomplished an almost perfect equalization of the 2% tax burden. . . ."

Like the Louisiana Supreme Court, he contends that the burden upon interstate commerce is "purely incidental." The Collector thus concedes that there is some discrimination against the interstate operator, but he argues that there is "almost perfect . . ." equality of treatment, and—in effect—that the "incidental" discrimination is *de minimis*.

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1. Motion to Dismiss, p. 9.

2. *Ibid.*, p. 12.

We respectfully submit that the Collector is in error. The issue here is very substantial, not only in the number of dollars involved, but in the number of taxpayers concerned.

Within the scant thirty days from the filing of the Jurisdictional Statement, the following taxpayers filed briefs *amicus curiae*:

1. Humble Oil and Refining Company
2. Chicago Bridge and Iron Company
3. Sperry Rand Corporation (Remington Rand Division)
4. Thomas Jordan, Inc.
5. American Can Company

The sums of money involved for five of the six taxpayers who have appeared herein are:

1. Halliburton Oil Well Cementing Company .....	\$ 40,642.65 <sup>3</sup>
2. Humble Oil and Refining Company....	18,659.95 <sup>4</sup>
3. Chicago Bridge and Iron Company....	82,226.41 <sup>5</sup>
4. Sperry Rand Corporation .....	4,710.93 <sup>6</sup>
5. Thomas Jordan, Inc. ....	49,999.24 <sup>7</sup>
6. American Can Company .....	
.....(amount not stated) .....	
<b>Total (for the tax years now at issue)</b> .....	<b>\$196,239.18</b>

3. Jurisdictional Statement, p. 68.

4. Humble's Brief *Amicus Curiae*, p. 3. Note that this \$18,659.95 is actually included in Chicago Bridge and Iron's \$82,226.41. *Ibidem*, fn. 1.

5. Chicago Bridge's Brief *Amicus Curiae*, p. 3.

6. Sperry Rand's Brief *Amicus Curiae*, p. 3.

7. Thomas Jordan's Brief *Amicus Curiae*, p. 2.



And, as Chicago Bridge and Iron put it, "such taxes continue to accrue . . ." from year to year to year.

Of course, the chorus of protest in these *amicus curiae* briefs is only from a representative cross-section of the hundreds of taxpayers who engage in interstate activities reaching into Louisiana and who, therefore—as this Court may judicially notice—are directly affected by the ruling of the Louisiana Supreme Court,—which authorizes heavier taxation upon interstate operators, and lighter taxation upon their purely intrastate competitors.

As this Court may observe—and as the Collector will readily concede—many millions of dollars of taxpayers money hang upon the final determination of this case.

The Collector frankly contends that Louisiana may erect a multi-million-dollar tax barrier at the state border lines, thus openly impeding the flow of interstate commerce. And he argues that he may do this, because the impediment is created by discrimination which is only "incidental." He argues that there is ". . . **almost** perfect equality of treatment," and that this is enough to satisfy the federal constitution.

It is respectfully submitted that the Collector's "**Almost-Equal**" argument is specious, and—further—that it is without foundation in fact

#### **SECOND: The Collector Would Compare the Incomparable.**

The Louisiana Supreme Court, adopting the Collector's arguments stated:

"The proper comparison would be between the use tax on the assembled equipment and a sales tax on the same equipment **IF** it were sold. . . ."

The Collector develops this misleading comparison at p. 9 of his Motion to Dismiss, viz.,

"The 2% sales tax and the 2% use tax if applied consistently as the Collector has applied it in this case, will assure that prior to the first use or consumption of any and all tangible property in the state, **such property shall bear a 2% tax burden**, either by virtue of its first sale at retail or by virtue of its first use in the State of Louisiana."

"Thus, every person in the state who first uses or consumes tangible personal property is placed on an equal economic basis with every other person using or consuming similar property."

We adopt the following clear discussion from the brief, *amicus curiae*, filed by Chicago Bridge and Iron Company:

"... the comparison suggested by the court is wholly **improper**. The assembled equipment was, in fact **not** sold by Halliburton. The absence of discrimination against Halliburton vis-a-vis local competitors who **sell** assembled equipment is immaterial. The damaging discrimination exists with respect to local competitors who, like Halliburton, do **not** sell, but who, unlike Halliburton, fabricate in Louisiana. **The cases that uphold non-discriminatory taxation of interstate commerce do not determine the**

presence or absence of discrimination by comparing the treatment of wholly unlike transactions. On the contrary, their plain teaching is that the determination must be made by comparing the taxation of an interstate transaction with the taxation of an identical transaction carried out entirely within the taxing state. If a State wishes to tax 'the stranger from afar' in respect of what he does outside the state, it must collect no greater toll from him than it collects from one of its own citizens **who does the same things** within its borders. This standard of equality Louisiana has stipulated that it does not meet."<sup>10</sup> (Emphasis supplied.)

The Louisiana Collector has stipulated that Halliburton (or a competitor of Halliburton in exactly the same line of endeavor) would pay no sales or use tax on the labor-and-shop-overhead if it set up its fabrication shops in Louisiana. Indeed, in his Motion to Dismiss, the Collector affirmatively argues that a taxpayer in Halliburton's position could "... reduce his tax burden by manufacturing [his] equipment in Louisiana for his own use."<sup>11</sup>

The Collector ignores (and would have the Court ignore) the fact that Halliburton is a **manufacturer, which uses its own work product**. Halliburton is a "manufacturer-user," sometimes called a producer-consumer. The fairness, and legality, of Halliburton's tax burden cannot be determined by comparing its economic activity with that of an intra-state seller or **purchaser-at-retail**.

This is the Collector's basic fallacy. He would argue

10. Chicago Bridge and Iron Company. Brief *Amicus Curiae*, at pp. 5-6.

11. Motion to Dismiss, at p. 10.

that the tax burdens are equal (upon the Louisiana residents and the out-of-state persons) because the sales tax, paid by a **purchaser-at-retail** in Louisiana, includes labor and overhead.

With respect, this is an effort to compare the incomparable. The price paid by a purchaser at retail (upon which a sales tax is paid) includes three elements (a) the cost of the physical parts incorporated in the finished product, (b) the labor and overhead element, and (c) the profit.

It is perfectly proper to compare the sales tax upon a sale-at-retail in Louisiana, with a use tax levied upon property **purchased** outside the state. There the economic act, upon which the incidence of the two taxes fall, is the same. And the tax burden is equal, falling upon all three above-named elements. We concede this.

But this is not what the Collector contends for here. He would compare the economic activity (the business endeavor) of an **out-of-state "manufacturer-user"** (Halliburton) with that of an **intra-state purchaser-at-retail**.

And this is the specious element in the Collector's argument. One cannot fairly compare optical lenses with fried eggs, nor compare peaches with new-born chicks. To test for discrimination, one must compare the comparable.

We submit that the only fair comparison would be to compare the tax burden of an **out-of-state manufacturer-user**, with the tax burden of an **intra-state manufacturer-user**. In other words, if Halliburton had in Louisiana a direct com-

petitor, in exactly the same operation, would the tax burden of each be the same?

Obviously, the Collector would demand the 2% use tax solely from Halliburton, the out-of-state operator, and he would exempt the intra-state operator. We submit that the Collector's position is discriminatory and illegal; that his position is unsound.

**THIRD: The Collector Argues that "... the property has not already borne a similar tax ..." in Any Other State.**

At pages 2, 3, and 9, the Collector makes this argument without articulating any conclusion therefrom. For example, at p. 3 the statement, *in toto*, is

"None of the property has ever been subjected in any other state to a similar tax."

In some obscure way, the Collector seeks freedom to discriminate here because Oklahoma has no Sales Tax.

This argument is wholly fallacious. If Oklahoma had a Sales Tax law, just as Louisiana has, then the sales tax that would have been paid to Oklahoma would have been a 2% tax on the tangible physical parts which were built into the finished equipment. Of course, there would have been no sales tax on the labor-and-shop-overhead element of cost. Thus, when the mobile truck-borne equipment was put in motion and driven up to the Louisiana state line, it would have borne a 2% tax upon its tangible physical parts, but no tax would have been paid upon the labor-and-shop-overhead element of its cost. This is exactly the same situation as that which now exists. A 2% tax has been paid to Louisiana, upon all of the

value of this equipment, except the labor-and-shop-overhead element. Louisiana is demanding a 2% tax on the labor-and-shop-overhead cost of this imported equipment, although, admittedly, it would not have taxed this element of cost in equipment fabricated in Louisiana. Similarly, if Oklahoma had a 2% sales tax, Louisiana would credit the taxpayer with the tax paid to Oklahoma (the tax on the tangible equipment) but would still demand the tax on labor-and-shop-overhead. The Louisiana statute specifically provides that "If the tax paid in another state is not equal to . . . the amount of tax imposed by this chapter . . .," the importing user must pay the difference. (La. R.S. 47:305. Jurisdictional Statement at p. 83.)

Therefore, it is clear beyond dispute that, if Oklahoma had a Sales Tax law, Louisiana's position would be unchanged. Louisiana would still demand 2% of the labor-and-shop-overhead, and 2% of the interstate transportation cost, while exempting both of these items where the fabrication and travel occurred entirely within Louisiana's borders. *Ergo*—Discrimination against interstate commerce. Whatever point the Collector intended to make here, it is without merit.

**FOURTH: A Problem of "Management." Save Louisiana Taxes by Manufacturing in Louisiana.**

The Collector argues that for Halliburton, this is

" . . . not an interstate commerce problem but a problem of management in locating and so arranging its operations in such manner as to reduce its cost of operations to a minimum."<sup>12</sup>

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12. Motion to Dismiss, p. 13.

And, he concedes that, if he is sustained here,

"a taxpayer may reduce his tax burden by manufacturing equipment within Louisiana for his own use."<sup>13</sup>

The Collector thus admits that the tax burden upon the out-of-state taxpayer (the multi-state operator) is not equal to, but is heavier than the burden upon the purely intra-state taxpayer. Yet, again and again he gives lip-service to the "fundamental purpose of equality of the Louisiana Use Tax."<sup>14</sup>

The Collector's argument is incredible. He contends that Louisiana's position is non-discriminatory. Simultaneously he argues that, by good corporate "management," Halliburton could avoid this Louisiana tax by ceasing its interstate movement, and becoming a purely intra-state operator, having its entire operation within Louisiana's borders! !

We respectfully submit that this is a case of gross avowed discrimination against interstate commerce; that there is a most substantial question here which ought to be finally determined by this High Court; that probable jurisdiction should be noted, and this case heard on its merits.

## CONCLUSION

If, "... the stranger from afar ..." is to bear a burden no heavier than that of "... the resident of Louisiana ...", (as the Collector concedes, and even argues), then the only comparison that can be made is to compare the burden which

13. *Ibid.*, p. 10.

14. *Ibid.*, p. 11.



falls upon the taxpayers in the two cases, by asking three simple questions:

What is the tax burden upon the **out-of-state taxpayer**, the "stranger from afar"?

What is the tax burden upon the **intra-state taxpayer**, the Louisiana resident?

Are these two tax burdens equal?

Obviously the tax burdens are not equal. The Louisiana Collector concedes that his position is discriminatory. He inaccurately argues that this separate tax treatment is "almost equal." He contends that the admitted discrimination is "incidental" and *de minimis*. He argues that Halliburton can reduce its tax burden by moving its plant to Louisiana. He says, "Get out of interstate commerce if you want to avoid this tax."

Appellant submits that this High Court ought to note probable jurisdiction in this case, and articulate a ruling one way or the other. Alabama, Ohio, North Dakota and, apparently, California have ruled that this unequal tax treatment offends the federal Constitution.<sup>15</sup> Louisiana alone rules such open discrimination to be legal and inoffensive. Many thousands of dollars, and a multitude of taxpayers are involved.

We submit that, into this chaotic situation, this High Court can and should lay down its calming rule for the guidance of the thousands of businesses which operate across inter-boundary lines. The question ought not to be left up in the air.

15. See Jurisdictional Statement, at p. 36, *et seq.*

Appellant earnestly submits this Court, having noted probable jurisdiction, should rule that the Constitution of the United States forbids the "forthright discrimination" which the Louisiana Collector would practice in this case.

Respectfully submitted,

C. VERNON PORTER  
BENJAMIN BROWN TAYLOR, JR.  
TOM FORE PHILLIPS

*Attorneys for Appellant, Halliburton  
Oil Well Cementing Company.*

Taylor, Porter, Brooks, Fuller &  
Phillips,  
1100 Louisiana National Bank Building  
Baton Rouge, Louisiana

Baton Rouge, Louisiana  
September 1, 1961

## PROOF OF SERVICE

I, Benjamin Brown Taylor, Jr., one of the attorneys for Halliburton Oil Well Cementing Company, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of September, 1961, I served a copy of the foregoing *Brief In Reply to Motion to Dismiss*, upon the following named persons, by mailing—postage prepaid—a copy thereof to each of them at their offices at the respective addresses set out opposite the name of each, viz.,

(1) Roland Cocreham, Collector of Revenue, Appellee  
% Chapman Sanford, Attorney of Record  
Capital Annex Building  
Baton Rouge, Louisiana

(2) Humble Oil and Refining Company, *Amicus Curiae*  
% Forest M. Darrough, Attorney of Record  
1216 Main Street  
Houston, Texas

(3) Chicago Bridge and Iron Company, *Amicus Curiae*  
% Albert L. Hopkins, Attorney of Record  
Hopkins, Sutter, Owen, Mulroy and Wentz, Attorneys  
One North LaSalle Street  
Chicago 2, Illinois

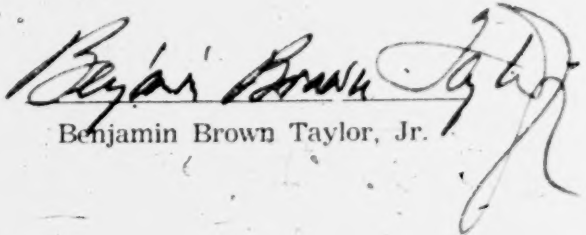
(4) Sperry Rand Corporation, *Amicus Curiae*  
% Cicero C. Sessions, Attorney of Record  
Sessions, Fishman, Rosenson & Shellings, Attorneys  
1333 National Bank of Commerce Building  
New Orleans 12, Louisiana

- (5) Thomas Jordan, Inc., *Amicus Curiae*

% Charles D. Marshall, Attorney of Record  
Milling, Saal, Saunders, Benson and Woodward  
1122 Whitney Building  
New Orleans 12, Louisiana

- (6) American Can Company, *Amicus Curiae*

% Ben R. Miller, Attorney of Record  
Sanders, Miller, Downing, Rubin and Kean  
P. O. Box 1588  
Baton Rouge, Louisiana

A handwritten signature in dark ink, appearing to read "Benjamin Brown Taylor, Jr.", with a large, stylized flourish extending from the end of the signature.

Benjamin Brown Taylor, Jr.

Baton Rouge, Louisiana  
September 1, 1961

Office Supreme Court, U.S.

FILED

SEP 28 1961

JAMES S. BROWNING, Clerk

**Supreme Court of the United States**

**OCTOBER TERM, 1961**

**No. ~~204~~**

**24**

**HALLIBURTON OIL WELL CEMENTING COMPANY**

**Appellant**

**versus**

**JAMES S. REILY, COLLECTOR OF REVENUE, STATE  
OF LOUISIANA (Since Succeeded by Robert L.  
Roland, who Was Duly Succeeded by Roland  
Coereham)**

**Appellee**

**On Appeal from the Supreme Court of the State of  
Louisiana**

**BRIEF OF AMICUS CURIAE, REPRESENTING  
BOSSON-RICHARDS PROCESSING COMPANY  
and WATE-KOTE COMPANY, LTD.**

**ROBERT E. LEAKE, JR.**

**1207 Whitney Building**

**New Orleans 12, Louisiana**

**Counsel of Record Upon Whom  
Service May Be Made**

**Of Counsel:**

**WARREN M. FARIS**

**FRANCIS C. EMMETT**

**CAMILLE A. CUTRONE**

**FARIS, LEAKE & EMMETT**

**1207 Whitney Bldg.**

**New Orleans 12, La.**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1961**

---

**No. 264**

---

**HALLIBURTON OIL WELL CEMENTING COMPANY**  
**Appellant**

**versus**

**JAMES S. REILY, COLLECTOR OF REVENUE, STATE  
OF LOUISIANA (Since Succeeded by Robert L.  
Roland, who Was Duly Succeeded by Roland  
Cocreham)**

**Appellee**

---

**On Appeal from the Supreme Court of the State of  
Louisiana**

---

**BRIEF OF AMICUS CURIAE, REPRESENTING  
ROSSON-RICHARDS PROCESSING COMPANY  
and WATE-KOTE COMPANY, LTD.\***

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*May it Please the Court:*

**THE QUESTION AT ISSUE**

Does the levy by Louisiana of a use tax upon the cost of transportation in interstate commerce, while, at

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\* Consent of the parties to the filing of this brief has been obtained. See certificate of counsel, post.

the same time, and under the same statute, levying no tax upon the cost of transportation of an identical nature which occurs entirely within the borders of Louisiana, offend the interstate commerce clause of the federal constitution?

**ROSSON-RICHARDS PROCESSING COMPANY, AND  
WATE-KOTE CO., LTD. HAVE AN ISSUE PAR-  
ALLEL TO THAT NOW AT BAR**

These two Texas corporations are engaged in business in many states, including Louisiana. Their operations play an important part in the construction of the extensive interstate pipeline systems which transport petroleum and petroleum products across the United States. Their place in this interstate transportation system is in the wrapping and coating of the iron pipe, a large portion of which is "laid" in Louisiana.

These taxpayers cover the pipe with a specially prepared aggregate material and wire mesh. The raw materials in question were produced in Illinois and Wyoming, where they were purchased by Rosson-Richards and Wate-Kote, who then transported them to Louisiana at their own risk for their own use.

These two Texas corporations have paid to Louisiana a use tax upon their entire purchase price for these materials, and the sole remaining issue between them and the Collector is whether they should be required to pay a use tax on the transportation charges incurred by them for moving these materials from Illinois and Wyoming to the Louisiana destination.



The Louisiana Sales and Use Tax Statute, Sec. 301 (3),<sup>1</sup> and the Louisiana Collector's regulatory interpretation thereunder<sup>2</sup> specifically provide that "cost price", which is the base for use tax calculation, shall include transportation charges incurred by the importer in "putting the finished product down in Louisiana."<sup>3</sup>

For the tax years in question (1958, 1959 and part of 1960), the Louisiana Collector demands a 2% use tax upon these interstate freight costs, as follows:

From Rosson-Richards .....	\$24,126.90
From Wate-Kote Co., Ltd. ....	6,746.90
Total .....	\$30,873.84

And, of course, these demands continue to accrue "from year to year."

If these taxpayers were to purchase their wire mesh and special concrete aggregate F.O.B. a Louisiana plant and then ship these materials within the State to the job-site, there would be a Louisiana sales tax upon the purchase price of the materials, but there would be no sales or use tax upon the purely "within-Louisiana" transportation costs incurred by taxpayers in shipping the materials. Such intrastate transportation charges, which form no part of the sales contract, are not taxed under the Louisiana Sales and Use Tax Statute, or sought to be taxed by the Collector. However, in this

<sup>1</sup> Jurisdictional Statement of Halliburton (Appendix B), p. 70.

<sup>2</sup> Ibid., pp. 11-12.

<sup>3</sup> Ibid.

case, because these two taxpayers buy their materials in Wyoming and Illinois, F.O.B. plant, and then bring them across state lines to the Louisiana job-site, the Louisiana Collector asserts his right to collect a 2% impost upon the cost of the entire movement both while out-of-state, and within the state.

The Louisiana Collector levies his tax upon interstate freight charges, while conceding the exemption from the same tax of the cost of purely intrastate transportation. And the movement within the state is sought to be taxed if it is part of an interstate movement.

It is respectfully submitted that this is a gross discrimination against interstate commerce in its classic form of transportation. If this court affords no relief, the Louisiana Collector will continue to enforce his two-per-cent penalty as an effective inducement to business concerns to make their purchases in Louisiana, rather than outside the state in interstate commerce. It is respectfully submitted that this method of taxation provides a "direct commercial advantage to local business," of the type prescribed by this court on numerous occasions. See particularly *Memphis Steam Laundry Cleaner, Inc. vs Stone*, 342 US 389, 96 L.Ed. 436, 72 S.Ct. 424 (1952), and the cases cited by the court in the *Stockham Valves* case. See "citations and quotations" in Jurisdictional Statement filed by Halliburton Oil, Well Cementing Company, at pp. 22-23.

## THE STATUS OF THESE TAXPAYERS' CLAIMS

The Louisiana Collector has demanded that the \$30,873.84 be paid, but has recognized that the decision of this court in the *Halliburton* case could do much to settle these taxpayers' problems. Like many other taxpayers, Rosson-Richards and Wate-Kote have agreed with the Louisiana Collector that the deficiency demands against them shall be held in abeyance, upon waivers of the Statute of Limitations, pending the final action of this court in the *Halliburton* case. Thus, like many other taxpayers engaged in interstate commerce, these taxpayers await a decision of this court in the *Halliburton* case with deep interest.

## THE ISSUE HERE IS SUBSTANTIAL

The Louisiana Collector frankly takes the position that he may levy a tax upon operations which occur wholly in interstate commerce, while simultaneously exempting the identical operations where they occur wholly within Louisiana's borders.

He contends that he is completely unhampered by the federal interstate commerce clause, so that:

1. He can tax the cost of "labor and shop overhead" when incurred outside Louisiana, while exempting such cost incurred within Louisiana;
2. He can tax the cost of ships, vessels, and barges built outside Louisiana and then imported into the state, while exempting such ships, vessels and barges built in Louisiana shipyards;<sup>5</sup>

<sup>4</sup> See Jurisdictional Statement of *Halliburton*, p. 9, et seq.

<sup>5</sup> *Ibid.*, p. 38, et seq. Brief, *Amicus Curiae*, filed by Thomas Jordan, Inc.

3. He can tax an "isolated sale" occurring outside Louisiana, while exempting an identical "isolated sale" which takes place within Louisiana's boundary lines;<sup>6</sup> and
4. He can tax the cost of interstate transportation from Wyoming and Illinois, to Louisiana, while simultaneously exempting from the same tax similar costs incurred in intrastate transportation inside Louisiana.

In the instant case, the Collector would add more than a million dollars to the tax base while admittedly he would not attempt to collect any tax upon intra-Louisiana freight costs.

### CONCLUSION

It is submitted that this court should note jurisdiction in this case to lay at rest the many disputes which have arisen in this field between the Louisiana Collector and various taxpayers who are engaged in interstate commerce.

ROBERT E. LEAKE, JR.  
1207 Whitney Building  
New Orleans 12, Louisiana  
Attorney for Rosson-Richards Processing  
Company and Wate-Kote Co.,  
Ltd.

<sup>6</sup> See Jurisdictional Statement of Halliburton, p. 14, et seq.

7

**CERTIFICATE OF CONSENT TO FILING OF AMICUS  
CURIAE BRIEF AND PROOF OF SERVICE**

I, Robert E. Leake, Jr., a member of the bar of the Supreme Court of the United States, do hereby certify that consent has been granted by both parties to this cause to filing of a brief, amicus curiae, in this cause on behalf of Rosson-Richards Processing Company and Wate-Kote Co., Ltd., and I attach to this brief letters evidencing such consent.

I further certify that I have on September . . . . 1961 served copies of the foregoing brief upon the several parties herein, by mailing same in duly addressed envelopes, with first class (and in the case of Chicago Bridge & Iron Company, airmail), postage prepaid, to their respective attorneys of record, as follows:

1—To Honorable Chapman L. Sanford, attorney for Roland Cocreham, Collector of Revenue of the State of Louisiana (successor in office to James S. Reily and Robert L. Roland, prior parties herein) appellee herein, at his office in the Capitol Annex Building, Baton Rouge, Louisiana.

2—To Messrs. C. Vernon Porter and Benjamin B. Taylor, Jr., attorneys for Halliburton Oil Well Cementing Company, appellant herein, at their office at 1100 Louisiana National Bank Building, Baton Rouge, Louisiana.

3—To Cicero C. Sessions, Esq., attorney for Sperry Rand Corporation, amicus curiae herein, at his office

at 1333 National Bank of Commerce Building, New Orleans 12, Louisiana.

4—To Charles D. Marshall, Esq., attorneys for Thomas Jordan, Inc., amicus curiae herein, at his office at 1122 Whitney Building, New Orleans 12, Louisiana.

5—To Albert L. Hopkins, Esq., attorney for Chicago Bridge & Iron Company, amicus curiae herein, at his office at One North LaSalle Street, Chicago 2, Illinois.

ROBERT E. LEAKE, JR.  
1207 Whitney Building  
New Orleans 12, Louisiana  
Attorney for Rosson-Richards Processing Company and Wate-Kote Co., Ltd. Amicus Curiae



ROLAND COCREHAM  
COLLECTOR OF REVENUE

DEPARTMENT OF REVENUE  
STATE OF LOUISIANA

BATON ROUGE 1

September 5, 1961

LEGAL DIVISION

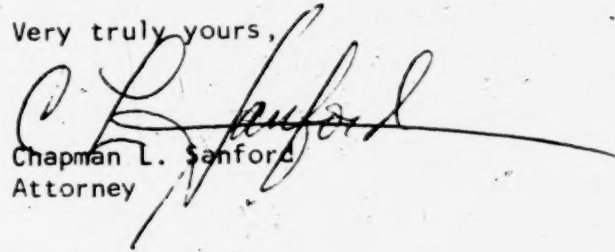
Farris, Leake & Emmett  
Attorneys at Law  
1207 Whitney Building  
New Orleans 12, Louisiana

Gentlemen:

Re: Halliburton Oil Well Cementing Co.  
vs. La. Collector of Revenue  
No. 264 in the Supreme Court of the  
United States - October Term 1961

On behalf of the Louisiana Collector of Revenue consent is hereby  
granted that you may file a brief amicus curiae on behalf of Rosson-  
Richards Processing Co. and Wate-Kote Co., Ltd.

Very truly yours,

  
Chapman L. Sanford  
Attorney

CLS:jdf



LAW OFFICES OF

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September 5, 1961

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WILLIAM G. RANDOLPH  
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Re: Halliburton Oil Well Cementing Company  
vs. Rely, Collector of Revenue  
No. 264, October Term, 1961  
Supreme Court of the United States

Gentlemen:

Consent is hereby granted for you to file a brief *amicus*  
*curiae* in this suit, on behalf of Rossen-Richards Processing Company  
and Wate-Kote Company, Limited.

Very truly yours,

TAYLOR, PORTER, BROOKS, FULLER & PHILLIPS

BY:

BBTJr/mm

*B B Taylor Jr*

*Attorney for  
Halliburton Oil  
Well Cementing Co -  
Appellant*

IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1961

No. ~~201~~ 24

**HALLIBURTON OIL WELL CEMENTING COMPANY,**

**Appellant**

*versus*

**JAMES S. REILY, COLLECTOR OF REVENUE, STATE  
OF LOUISIANA (Since Succeeded by Robert L. Roland,  
Who Was Duly Succeeded by Roland Cocreham),**

**Appellee**

**ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF LOUISIANA**

**BRIEF FOR THE APPELLANT**

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Baton Rouge, Louisiana  
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**Appellee**

---

**ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF LOUISIANA**

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**BRIEF FOR THE APPELLANT**

*May It Pleadse the Court:*

Halliburton Oil Well Cementing Company, of Duncan, Oklahoma, appeals from a decision of the Supreme Court of Louisiana, which upholds the Louisiana Collector of Revenue in his interpretation and administration of the Louisiana Use Tax. By order dated October 9, 1961, this Court noted probable jurisdiction of the case.<sup>1</sup>

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<sup>1</sup> Printed Transcript of Record, p. 77.

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana is reported at 241 La. 67, 127 So. 2d 502, and is reproduced at page 34, *et seq.*, of the printed Transcript of Record.

The opinion of the trial court, September 25, 1959, is not reported, but is found at p. 65, *et seq.*, of the Original Record.

## JURISDICTION

This is a suit for a refund of tax moneys paid under protest. The taxing statute in question is the Louisiana "Sales Tax,"<sup>2</sup> commonly called the "Sales and Use Tax." The suit for refund is specifically authorized by, and properly brought under, the provisions of Louisiana Revised Statutes 47:1576. This is uncontested.

Halliburton conducts interstate business operations, partially outside Louisiana, partially within Louisiana. Halliburton contended that the interstate nature of its operations ought not to give rise to any additional burden of Louisiana taxes; that it ought not be taxed any more heavily than if its operations were conducted wholly within Louisiana's border lines.

<sup>1</sup>The opinion of the Trial Court (19th Judicial District Court, Louisiana) is not reproduced in the printed record for the reason that it consists of a short introduction followed by this language:

"Counsel for plaintiff [appellant here] has filed an exhaustive written brief. . . . This brief discusses quite clearly and fully the facts . . . and the law. . . . I agree with counsel's arguments and adopt his brief in full as my reasons for judgment herein. I . . . Attach his brief hereto as if fully written herein." (Original Record, p. 67)

As may be noted from the Original Record, the reasoning in the Trial Court brief, thus rendered into "reasons for judgment," is essentially the same as that set forth in this brief.

<sup>2</sup> La. R.S. 47:301, *et seq.* See Appendix "A," p. 74, *infra*.

The Louisiana Supreme Court held that the Louisiana Collector could discriminate against Halliburton, and tax it more heavily, as compared to the tax burden which would fall upon Halliburton (or a competitor of Halliburton) if the business operations did not cross state lines; that Louisiana may thus levy an **excise** tax upon the privilege of moving goods in interstate commerce.

The issue is whether or not such frankly discriminatory taxation is offensive to the Constitution of the United States, including particularly the Interstate Commerce Clause (Article I, Sec. 8, Clause 3), and or the Fourteenth Amendment. The trial court held that the discriminatory excise tax was a burden upon interstate commerce, which was violative of the Federal Constitution, and that the heavier excise tax (falling solely upon the taxpayer who brought his goods into Louisiana, across the state line) was also a denial of due process, and of the protection of the laws, guaranteed by the Fourteenth Amendment of the Federal Constitution. The Louisiana Supreme Court reversed and held that Louisiana may collect the heavier excise tax from the individual who uses chattels moved into Louisiana from outside the state, while exempting from the same tax burden the individual who uses chattels produced in Louisiana, and which thus lack the element of interstate transportation.

The Supreme Court of the State of Louisiana initially rendered its decision on the 15th day of February, 1961. Application for Rehearing was timely filed by present appellant, on the 27th day of February, 1961, and said Application for Rehearing suspended the finality of the decision of the Louisiana Supreme Court until that court denied the Application for Rehearing, on the 20th day of March, 1961, at eleven



o'clock a.m. (Louisiana Code of Civil Procedure, Articles 2166-2167).

Notice of Appeal to the Supreme Court of the United States was timely filed by appellant, in the Supreme Court of the State of Louisiana, on the 2nd day of June, 1961.

The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment of the Louisiana court, on direct appeal, in this case: *Henneford v. Silas Mason Company*, 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814 (1936); *Northwestern States Portland Cement Company v. Minnesota*, 358 U. S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421, 67 ALR 2d 1292 (1959); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 72 S. Ct. 424, 96 L. Ed. 436 (1952); *Nippert v. City of Richmond*, 327 U. S. 416, 66 St. Ct. 586, 90 L. Ed. 760, 162 ALR 844 (1946); *Freeman v. Hewitt*, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265 (1946).

## QUESTIONS PRESENTED

The issue in this case arises within the following framework:

1. The Louisiana "sales tax" (as distinguished from the "use tax"), like the sales tax of other states, is levied only upon transactions which occur within the borders of the state, i.e., only upon intrastate transactions.

2. It was found (in Louisiana and elsewhere) that such sales taxes, falling only upon the intrastate transactions,

tended to drive business out of the state. People would go outside the state for their major purchases, thus avoiding the intrastate **sales tax**.

3. Accordingly "compensating" **Use Tax** statutes were enacted to prevent such discrimination against local merchants. The use tax falls solely upon the use, within the state, of goods acquired outside the state and then brought into the state across the interstate borderline. The Use Tax was designed to prevent discrimination against intrastate transactions. In Louisiana, the two taxes were combined into one statute known as "The Sales and Use Tax" Statute (La. R.S. 47:301, et seq.). Appendix "A," *infra*, p. 74.

The Louisiana Supreme Court has said this:

"As a device for supplementing or complementing the sales tax, resort has been made to use or compensating taxes. A use tax is an integrated part of a sales tax, one of its purposes being to prevent purchases of tangible personal property outside . . . [the jurisdiction] . . . in an effort to escape the payment of the tax on local sales . . ."

*Chrysler Corp. v. City of New Orleans*, 238 La. 123, 114 So. 2d 579, at 581 (1959).

4. Since the Use Tax falls only upon the situation in which there has been an **interstate** movement of goods, such a statute was quickly attacked as repugnant to the interstate commerce clause of the Federal Constitution. This attack was made, in 1936, by the Silas Mason Company which had brought heavy earth-moving equipment into the State of Washington, to construct the Grand Coulee dam.

5. The Use Tax was upheld by this court, as constitu-

tional, although it fell only upon activities involving interstate movement, because (in the case then at issue) it did not exceed the comparable sales tax of the same state and was merely complementary to the sales tax and precisely equal to the sales tax, and—therefore—the use tax did not “discriminate” against the interstate transactions. *Henneford v. Silas Mason Company*, 300 U. S. 577, 57 S. Ct. 524, 81 L. Ed. 814 (1936).

6. In a case, however, where the use tax of a state, falling solely on **interstate** transactions, levies a burden which is more onerous than the sales tax, falling on comparable intrastate transactions, then the use tax loses the fiat of the *Henneford* decision, and is unconstitutional because it does discriminate against the transactions which are in interstate commerce. This is the essential position of appellant taxpayer.

7. It is to be noted that the Louisiana Sales and Use Tax is an **excise** tax levied upon the privilege of performing an act. *Mouldoux v. Maestri*, 197 Lo. 525, 2 So. 2d 11 (1941). See also *Brandtgen & Kluge v. Fincher*, 111 P. 2d 979, 980, 44 Cal. App. Supp. 939, and Words & Phrases, Vol. 15 (a), p. 171, verbo “Excise.”

The issue here is whether or not the State of Louisiana (through its Collector of Revenue) may openly and avowedly discriminate against the taxpayer whose operations cross interstate border lines, and in favor of the competing taxpayer who operates wholly within Louisiana boundaries.

The Louisiana Supreme Court has held that the Louisiana **Use Tax** may be designed and enforced so as to place a heavier excise tax burden upon interstate operations than the

excise tax burden of the **Sales Tax** which falls upon comparable intrastate operations. The decision is tantamount to a holding that Louisiana may erect a wall of taxes at the state line. The incidence of the additional excise tax burden falls upon the act of crossing the state border line.

. . .

Thus, the following questions are presented by this appeal:

1. Whether or not the State of Louisiana, through its Collector of Revenue, may apply an excise tax, the Louisiana Sales and Use Tax, so that the burden thereof bears more heavily upon a taxpayer who comes into Louisiana from outside the state than the burden of the same tax statute would bear upon a Louisiana resident engaged in precisely the same economic activity as that of the more heavily taxed non-resident.

2. Whether or not the Supreme Court of the State of Louisiana may constitutionally render a judgment which specifically approves and authorizes the State of Louisiana to discriminate against non-residents of Louisiana, doing business in Louisiana, and in favor of residents of Louisiana, by inflicting a discriminatory excise tax upon the non-residents, which is heavier than the comparable excise tax burden which falls upon Louisiana residents engaged in precisely the same activity.

3. Whether or not the State of Louisiana may tax (via its Sales and Use Tax) the non-resident ("the stranger from afar") more heavily than it would tax a resident Louisiana citizen engaged in the same identical business operation, in view of the fact that the Supreme Court of the United States has held that:

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

*Best & Co. v. Maxwell*, 311 U. S. 454, 61 S. Ct. 335, 85 L. Ed. 275 (1940).

4. Whether or not the State of Louisiana may give separate and unequal treatment to the business man who brings his goods across state lines (taxing him more heavily than it would tax his intrastate competitor), in view of the requirement set up by the Supreme Court of the United States, in *Henneford v. Silas Mason Company*, 300 U. S. 57, 57 S. Ct. 524, 81 L. Ed. 814 (1936), for a valid state use tax, as follows:

"Equality is the theme that runs through all sections of the statute. . . .

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. . . ."

\* \* \*

"In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local. . . ."

5. Whether or not the Louisiana Sales and Use Tax Statute, as applied by the Louisiana Collector of Revenue so as to tax non-residents<sup>1</sup> more heavily than he would apply and

<sup>1</sup> Of course, the heavier excise tax would also fall on a Louisiana resident who chose to conduct the production part of his operations in another state, and then moved his chattels into Louisiana, for use. It is the multi-state operation and interstate movement which gives rise to the additional tax.

levy the same excise tax upon Louisiana residents, is offensive to and repugnant to and violative of the Constitution of the United States, including but not limited to the following clauses thereof:

- a. **The Interstate Commerce Clause**, being Article I, Section 8, Clause 3, of the Constitution of the United States;
- b. **The Due Process Clause**, being a portion of the Fourteenth Amendment to the Constitution of the United States;
- c. **The Equal Protection of the Laws Clause**, being a portion of the Fourteenth Amendment to the Constitution of the United States;

it being the principal contention of Halliburton Oil Well Cementing Company (taxpayer herein) that the discriminatory excise tax burden, of which complaint is made, does fall upon persons who conduct a part of their operations outside the State of Louisiana and then cross the state line into Louisiana, whereas, said excise tax burden does not fall upon persons who conduct identical operations entirely within the interstate border line of the State of Louisiana, and said taxpayer contends that such discriminatory taxation directly infringes upon the right of regulation of interstate commerce, vested in the Federal Congress, for the reason, among others, that it is an attempt by the State of Louisiana to lay an excise tax on the privilege of engaging in interstate commerce and upon the carrying on of a business in interstate commerce; that the tax statute is arbitrary and discriminatory in violation of the Fourteenth Amendment; that the taxing statute, therefore, is not valid.

## CONSTITUTIONAL PROVISIONS AND STATUTES

The familiar "interstate commerce" clause of Section 8, of the Constitution of the United States, is as follows:

**"Section 8, Clause 1. Powers of Congress; levy of taxes for common defense and general welfare; uniformity of taxation**

**"The Congress shall have the Power . . .**

**"Section 8, Clause 3. Regulation of commerce**

**"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;**

The pertinent portions of the Fourteenth Amendment to the Constitution of the United States, containing the "due process" clause and the "equal protection of the laws" clause, are as follows:

**"AMENDMENT XIV. Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."**

The Louisiana taxing statute, the validity of which is attacked, is the Louisiana Sales and Use Tax, Louisiana Revised Statutes of 1950, Title 47, Sections 301-318. A copy of the pertinent provisions of that statute is attached hereto, as Appendix "A," *infra*, p. 74.

The appellant taxpayer, Halliburton, quotes the following policy statement from the Louisiana statute:

**"RS 47:305—It is not the intention of this Chapter**



to levy a tax upon articles of personal property imported into this state, . . . ; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce . . . ."

And the taxpayer quotes the Louisiana Collector's own Sales and Use Tax Regulation, Art. 2-3.<sup>1</sup>

**"Generally, it may be said that the Use Tax applies to the use of property in this State, the sale of which would be subject to tax had there been a purchase within this State. The Use Tax does not apply upon the use of any property which has been subjected to a sales tax in another State at a rate equal to or greater than the rate of tax imposed by the Louisiana General Sales Tax, nor does the Use Tax apply upon the use of any property which is exempt from the tax imposed upon the sale at retail by the Louisiana General Sales Tax Act. The two taxes, Sales and Use, stand as complements to each other and taken together provide a uniform tax upon either the sale at retail or use of all tangible personal property irrespective of where it may have been purchased." (CCH State and Local Tax Reporter, Louisiana, Volume 1, Section 60-101(a). Emphasis supplied)**

## STATEMENT OF THE CASE

There is but one issue of law here—whether state taxation may discriminate against the multi-state business operation and in favor of local intrastate business.

But this issue arises upon two different sets of operative facts. These two situations will be discussed under two headings:

**"First: The Labor and Shop Overhead Phase,"**

**"Second: The Isolated Sales Phase."**

<sup>1</sup> Effective May 1, 1961, this Regulation was revised, but—of course—such revision is without operative effect here.

Initially there was a third phase, entitled "*The Cost v. Depreciated Value Phase*," but this third phase has been resolved and is not now at issue.

The case was submitted upon a Stipulation of Facts,<sup>1</sup> and upon the admitted allegations of the first eight paragraphs of the petition,<sup>2</sup> to which stipulation and admissions this Court is respectfully referred.

First: "**The Labor and Shop Overhead Phase**"

The question here is whether or not Louisiana may include the labor-and-shop-overhead element of cost in the tax base of the interstate operator while excluding this element of cost from the tax base of his intra-state competitor.

In its shops at Duncan, Oklahoma, appellant Halliburton produces and fabricates complex truck-borne oil-well servicing equipment which it uses in Louisiana. See Photographs Annex 8 and Annex 9 to the original Petition (Record, 17 and 19). Halliburton uses this type of equipment in Louisiana, under contract, but does not sell the equipment. It is a significant operative fact that Halliburton is a producer using its own product, sometimes called a "manufacturer-user," or "producer-consumer."

When Halliburton brought the fabricated equipment into Louisiana, it paid a use tax upon the cost to it of the tangible physical properties incorporated into the equipment. Louisiana now demands, additionally, a 2% use tax upon the labor

<sup>1</sup> Printed Transcript of Record, p. 22, *et seq.*

<sup>2</sup> *Ibid.*, pp. 2-6.

and shop overhead expended in assembling and producing the finished item.

If Halliburton had its shops in Louisiana, instead of in Oklahoma, a sales tax would fall upon its operations (i.e., the production and use of an item of equipment) as follows: (1) a sales tax would fall upon the purchase price of the truck chassis when it was purchased by Halliburton and (2) a sales tax would fall upon the purchase price of each item of physical equipment (e.g., motors, pipes, gauges, metal, gaskets, etc.) which was purchased by Halliburton for incorporation into the finished product item. But, of course, there would be no sales tax whatsoever, and no use tax whatsoever upon the "labor and shop overhead" which went into the assembly operation, which transformed the raw truck chassis and the other raw metal parts into the complex finished item. This is incontestible and uncontested.

The Collector has stipulated that his position is discriminatory.

"If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of the materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead." (Stipulation—Par. IV. Record, pp. 26-27)

Nevertheless, says the Collector, because Halliburton has its shops in Oklahoma, and not in Louisiana, an additional 2% tax must be paid. Because Halliburton operates its construction shops in Oklahoma and not in Louisiana, the Collec-

tor would demand a penalty excise tax measured by 2% of the "labor and shop overhead" expended by Halliburton, in ~~its~~ Duncan, Oklahoma, shops.

**The Collector's Ruling:**

The Collector has accorded his discriminatory position the status of a regulation in an open letter, directed to Commerce Clearing House Tax Service, under date of October 10, 1956, reported in CCH Louisiana State Tax Service, Par. 200-115, viz.,

"(§ 200-115) Letter from Legal Division, Department of Revenue, October 10, 1956.

**"Sales and use tax—Cost basis of direct labor and overhead charges.**

"The cost basis with regard to direct labor and overhead charges where supply items are purchased at retail outside of Louisiana and manufactured, fabricated and assembled **outside of Louisiana** into a finished product which is brought into the state for use solely by the fabricator is the cost to the fabricator of putting the finished product down in Louisiana. This cost includes all cost of acquiring the materials, fabrication and assembly, labor overhead, transportation and other incidental costs.

"See § 60-101-a."

**Question submitted by CCH.**

"What is the cost basis for Louisiana Sales or Use Tax purposes with regard to direct labor and overhead charges where supply items are purchased at retail **outside of Louisiana** and manufactured, fabricated and assembled **outside of Louisiana** into a finished product which is brought into Louisiana for use solely by the fabricator and not manufactured, held or offered for resale?"

### Answer [By the Collector]

"Louisiana Revised Statutes of 1950, Title 47, Section 302, levies a tax upon the use of each item of tangible personal property in the State at the rate of two per centum (2%) of the 'cost price' of each such item.

"'Cost price', according to Section 301 of Title 47, Louisiana Revised Statutes of 1950 'means the **actual cost** of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, **labor or service cost, transportation charges** or any other expenses whatsoever.'

"In accordance with these provisions of the law, the basis for the Use Tax in Louisiana, under the circumstances enumerated in your question, is the cost to the fabricator of putting the finished product down in Louisiana. **This cost would include all costs** of acquiring the materials used, fabrication and assembly, **labor, overhead, transportation, and any other costs incident thereto.**"

The companion letter, from the Louisiana Collector, to CCH, showing that no use tax is due on labor and shop overhead, where "... supply items are ... manufactured, fabricated and assembled in Louisiana for use solely by the purchaser ..." is reproduced as Annex "B" hereto.<sup>1</sup> It is not reproduced here because the Collector has stipulated on this point.

### The Unconstitutionality:

Halliburton is a manufacturer which uses (but does not sell) its own work product. It is a "manufacturer-user," sometimes called a "producer-consumer."

<sup>1</sup> *Infra*, p. 83. This letter is reported in CCH Louisiana State Tax Service, Par 200-114.

In its totality, Halliburton's business operation here at issue is a **production-followed-by-a-use**. The production occurs in Oklahoma. Then the element of interstate transportation (to Louisiana) occurs. Then the property is used, by Halliburton, in Louisiana, to perform its oil well servicing contracts.

If the production-followed-by-a-use were wholly intrastate, there would be neither a sales tax, nor a use tax, on the cost of the labor-and-shop-overhead. This is stipulated. Where, however, the operation is multi-state in nature (with production in Oklahoma, and interstate transportation to Louisiana), the Louisiana Collector demands his two per cent of the cost of labor-and-shop-overhead, under the Louisiana Sales and Use Tax statute. There is no scintilla of fact which distinguishes the non-taxable (intrastate) operation from the interstate operation (which the Collector would tax) except the single simple fact that in the latter situation there exists the element of multi-state operation and interstate movement of goods. It is upon this element (interstate commerce) that the Louisiana Collector fixes the incidence of his tax.

The Louisiana Use Tax is fixed at 2% of "cost price" (Sec. 302(A) (2)<sup>1</sup> and "cost price" is defined as including "labor" (Sec. 301(3) ).<sup>2</sup> The Collector (sustained by the Louisiana

<sup>1</sup> See Appendix "A," *infra*, p. 80.

<sup>2</sup> See Appendix "A," *infra*, p. 76. The statute provides:

"'Cost price' means the actual cost . . . without any deduction . . . on account of the cost of materials used, labor or service cost, transportation charges, or any other expenses whatsoever."

We submit that this simply means that a purchaser cannot deduct any portion of what he actually pays for an article. This should not mean that out-of-state taxpayers must add their own labor to the tax base, particularly since intra-state taxpayers do not add their own labor to their tax base.



Supreme Court) therefore includes labor and shop overhead in the base of the "Use Tax," while excluding it from the base of the "Sales Tax." Thus, the discrimination against the transaction which involves the interstate movement.

Obviously, the Collector would tax the Labor and Shop Overhead for the sole and only reason that it took place outside Louisiana. Halliburton contends that this is discrimination of the clearest and most elementary type.

Halliburton concedes that (as an out-of-state "manufacturer-user") it brings these complex and vastly useful pieces of equipment into Louisiana, where they serve the Louisiana oil producers. And, Halliburton is quite willing to pay to the State of Louisiana a Use Tax in exactly the same sum as the Sales Tax would be; upon a comparable operation (by an intra-state "manufacturer-user") in Louisiana. But, says Halliburton, "No penalty should be levied upon us merely because we have our shops in Oklahoma and not in Louisiana." And Halliburton adds, "There should be no collection of toll at the Louisiana State line."

It is unequivocally clear that, if Halliburton operated entirely in Louisiana, and had its shops in Louisiana, there would be neither any sales tax, nor any use tax, upon the "labor and shop overhead" element which it put into its finished products. Halliburton respectfully submits that there should be no increase in its Louisiana tax burden, simply because it first creates its products in Oklahoma, and then moves them across the state line into Louisiana, where it uses them to serve Louisiana oil operators.

<sup>1</sup> Note the statutory disavowal of intent to tax interstate commerce, Sec. 305, at p. 81, *infra*.



Halliburton contends that such a tax, based solely upon the movement of goods in interstate commerce, is discriminatory and is an unconstitutional burden upon interstate commerce.

Second: **"The Isolated Sales Phase"**

The question here is whether or not the Use Tax (which falls solely upon interstate transactions) may be collected, constitutionally, upon a type of transaction which would be exempt from the Sales Tax if the transaction were wholly intrastate. Can the additional element of multi-state operations and interstate movement of goods give rise to additional Louisiana taxes?

The Louisiana Sales Tax Statute (R.S. 47:301(10)) provides specifically that:

... nor [shall the terms 'sale at retail'] include an isolated or occasional sale of tangible personal property by a person not engaged in such business."

The Louisiana Department of Revenue Sales Tax Regulations provide:

The components used by Halliburton, in Oklahoma, to fabricate their equipment, were exempt from the Oklahoma Sales Tax because the production was for export. However, let us suppose, hypothetically, that a 2% Oklahoma Sales Tax had been paid, by Halliburton, on the cost of the component parts. The Louisiana statute would credit Halliburton with the 2% tax paid to Oklahoma upon the tangible physical properties incorporated in the finished items of equipment. (See 305, *infra*, p. 82.) Louisiana would still demand a 2% use tax on the labor and shop overhead expended in assembling the finished item. This intangible element of "cost price" would be taxed, (by Louisiana) if incurred in Oklahoma. It would not be taxed if incurred in Louisiana.

<sup>2</sup> Appendix "A," *infra*, p. 78.

"Art 2-33. Casual and Isolated Sales—

"The tax does not apply to casual and isolated sales by persons not engaged in the business of selling such tangible personal property. . . ."

It is clear, therefore, that a "casual and isolated sale, by a person not engaged in the business of selling . . ." the type of property at issue, is completely exempted from the Louisiana Sales Tax. This is uncontested.

The Collector of Revenue contends, and the Louisiana Court has held, that the Louisiana statute and regulations cannot be construed to grant a comparable "isolated sales" exemption in the case of the use tax. The Collector concedes that an "isolated or casual" sale made in Louisiana is exempted from the Louisiana sales tax. The Collector contends, however, that the use tax as levied by the taxing statute, properly falls upon the use, in Louisiana, of property which was acquired through an "isolated or casual sale" made in another state.

The issue is squarely raised here. Halliburton purchased certain oil field equipment from Spartan Tool and Service Company of Houston, Texas, when that concern went out of business. And I purchased an airplane from the "Western Newspaper Union, of New York." It is stipulated that neither of these vendors was in the business of selling such equipment. It is stipulated that such sales were 'casual, occasional and isolated sales. . . ." (Stipulation of Facts. Par. VI. R. 29)

It is completely clear that if these "isolated sales" transactions had taken place within the borders of Louisiana, no

sales tax would have fallen upon the transaction. Nor would any use tax have been incurred by anybody. This is stipulated.

We quote from Par. VI. of the Stipulation of Facts:

"It is further stipulated that the entire . . . [purchase price] . . . would not have been subject to the Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made within the State of Louisiana." (R. 30)

The Collector's position, therefore, is that because these isolated sales occurred outside of Louisiana, the taxpayer must pay a two per cent "use" tax, that would not fall upon the use of the properties if the transactions had occurred in Louisiana. It is clear that this use tax is demanded by the Collector solely because the isolated sales transactions occurred outside Louisiana and the goods thereafter were brought across the state line. Thus, the Collector concedes that, but for this element of interstate transportation, he would not be demanding this tax money at all.<sup>1</sup>

Suppose Halliburton had taken delivery of the newspaper company's airplane at the Moisant Airport, in New Orleans, so that the sale was a Louisiana transaction. Obviously—no sales tax on this "isolated sale transaction." In the present case, the state demands the 2% use tax solely because the "isolated sale transactions" took place outside Louisiana and, thereafter, the airplane, etc., were transported, in interstate commerce, across the Louisiana state border line.

<sup>1</sup> Note that the Louisiana Collector would levy a tax penalty upon purchasers who do not confine themselves to the Louisiana market-place.

Each of the transactions at issue, viewed in its entirety, amounted to a purchase-followed-by-a-use. The purchases occurred outside Louisiana. Then the element of interstate transportation (to Louisiana) occurred. Then the properties were used, by Halliburton, in Louisiana, to perform its oil well servicing contracts.

If the entire operation (purchase-and-use) were wholly intrastate, there would be neither a sales tax, nor a use tax. This is stipulated. Where, however, the operation is multi-state in nature, with purchase outside Louisiana and interstate transportation to Louisiana, the Louisiana Collector demands his two per cent under the Louisiana Sales and Use Tax Statute. The distinguishing element, which generates the additional tax—so argues the Collector—is the multi-state nature of the operation and the interstate movement of goods. There is no other distinction.

In effect, the Louisiana Collector would employ the 2% use tax as an import tax. He would levy it only where the "isolated" purchase is made outside Louisiana. He would thus create a 2% inducement to make such purchases within Louisiana. He would give a direct commercial advantage to Louisiana vendors. He would directly discriminate against the out-of-state vendor. He would penalize Halliburton for going beyond the Louisiana market-place.

The taxpayer's contention that this discriminatory result is unconstitutional is precisely upheld in *State v. Bay Towing and Dredging Company, Inc.*, 265 Ala. 282, 90 So. 2d 743 (Alabama, S. Ct., 1956). See discussion, *infra*, p. 42.

### **How Federal Questions Were Presented:**

There is no issue in this case other than whether or not the Louisiana taxing statute, as construed by the Louisiana Collector and the Louisiana Supreme Court, is offensive to the Federal Constitution. The issue was raised in the initial pleadings filed, and throughout all phases of the case.

The following is quoted from the original petition filed by Halliburton:

#### **"XI.**

"As to each of the aforesaid three phases of this case, the taxpayer alleges—inter alia—that the Use Tax, if interpreted and applied as the Collector would interpret and apply it here would cast upon the taxpayer (petitioner) a burden more onerous than that which would be levied by the Louisiana Sales and Use Tax had the transactions involved occurred in Louisiana; that a state Use Tax may be upheld as reasonable, legal and constitutional only insofar as the burden thereof is equal to, and not in excess of the burden of the Sales Tax of that same state, to which Sales Tax said Use Tax is complementary. And the taxpayer further alleges that:

"A. The assessment proposed by the Collector, insofar as it results in a greater use tax liability than would be imposed under the sales tax if the transactions had taken place in Louisiana, is contrary to the terms and wording of the Louisiana taxing statute, as well as contrary to the intent and purposes of the Louisiana legislature in enacting the taxing statute; and

<sup>1</sup> The initial pleading, R. 7, et seq.

"B. The practical effect of the Collector's proposed assessment is to subject goods moving [in] interstate commerce to a greater tax liability than would be imposed in the same situation; if all of the operative facts had occurred within the State of Louisiana, and therefore, the taxing statute, (if interpreted and applied as the Collector would interpret and apply it here) would amount to a discrimination against interstate commerce prohibited by the Commerce Clause of the United States Constitution; and

"C. The interpretation and application of the Louisiana Use Tax Statute, as proposed here by the Collector, is so unreasonable, arbitrary and capricious, and is so without regard to the true facts, and the economic realities of the factual situations, as to amount to a denial of due process of law within the meaning of the 'due process' clause of the United States Constitution.

## "XII.

"Regulation of interstate commerce is a function explicitly reserved to the Congress of the United States by virtue of the Constitution of the United States and particularly Article I, Section 8, Clause 3 thereof, and the tax here demanded and contended for by the Collector of Revenue of Louisiana directly infringes on that right of regulation vested in the Federal Congress, for the reason, among others, that, [it] is an attempt by the State of Louisiana to lay a tax on the privilege of engaging in interstate commerce and upon the carrying on of the business of interstate commerce.

## "XIII.

"Petitioner alleges that it would be deprived of its property without due process of law contrary to the pro-

tection and guaranty granted under the Constitution of the United States and particularly under the Fourteenth Amendment thereof and under Article I, Section 2, of the Constitution of the State of Louisiana should it be required to pay said taxes and the refund herein claimed be denied to it."

That the federal constitutional question was at issue throughout the case is made plain by the following language from the opinion of the Louisiana Supreme Court:

"Halliburton brought suit for a return of the amount in dispute, *supra*, alleging that the Use Tax, if interpreted and applied as the Collector would interpret and apply it to Halliburton, would cast upon the taxpayer (Halliburton) a burden more onerous than that which would be levied by the Louisiana Sales and Use Tax had the transactions involved occurred in Louisiana; and, that a state Use Tax may be upheld as reasonable, legal and constitutional, only insofar as the burden thereof is equal to and not in excess of the burden of the Sales Tax of that same state, to which Sales Tax said Use Tax is complementary. Plaintiff further alleged that the tax demanded of it infringed upon the right of regulation of interstate commerce by Congress (Article I, Section 8, Clause 3, Constitution of the United States), in that it was an attempt by the State of Louisiana to lay a tax on the privilege of engaging in interstate commerce and upon the carrying on of the business of interstate commerce. It still further alleged that it would be deprived of its property without due process of law, contrary to the protection and guaranty granted under the Constitution of the United States and particularly under the Fourteenth Amendment thereof and under Article I, Section 2, of the Constitution of the State of Louisiana, should it be required to pay the tax assessed.



"The trial court agreed with plaintiff and rendered judgment in its favor after trial. . . ."

"We conclude that under the rulings of the above authorities the 'use tax' as applied to plaintiff does not infringe upon the regulation of interstate commerce by Congress."

"Plaintiff endeavors to set forth the alleged inequality of the use tax as applied to it by arguing that if a local oil well servicing company had manufactured its own equipment in Louisiana it would only have had to pay a sales tax on the component parts employed, whereas plaintiff has been assessed a use tax not only on the component parts but also on the cost of labor and shop overhead. Plaintiff argues, as set forth, supra, that its burden, as compared to that of a local taxpayer, is so unequal as to constitute a violation of the 14th Amendment to the United States Constitution and of Article I, Section 2, of the Constitution of Louisiana."

"What does 'equal protection of the laws' mean as applied to taxation? Equal protection cannot be said to be denied by a statute which operates alike on all persons and property similarly situated, or by proceedings for the assessment and collection of taxes which follow the course customarily pursued in the state."

"We do not find that the Louisiana Use Tax treats any person differently from any other person in a like circumstance. All users are subjected to the same rate

of tax: there is no arbitrary or unreasonable distinction. The law contains no hostility nor discrimination; it singles out no class of persons as subjects for its assessment.

"We do not find that the use tax as herein applied imposes an unconstitutional burden on plaintiff."

"... plaintiff relies on the case of *State of Alabama v. Bay Towing & Dredging Company, Inc.*, 90 So. 2d 743, wherein the Supreme Court of Alabama stated:

"As we see it, if the use tax act is construed as imposing a tax on the use in this state of tangible personal property purchased outside the state in casual and isolated sales transactions, such tax would constitute an unlawful discrimination against interstate commerce, contrary to the Commerce Clause of the United States Constitution, Const. art. 1, sec. 8, cl. 3, since no similar or equivalent tax burden is imposed in connection with the purchase of such property in casual and isolated sales transactions within the state. . . ."

"We might say at the outset that we do not feel constrained to follow the Alabama case, supra, because we find that the instant matter does not involve a question of interstate commerce."

"... we find no discrimination nor deprivation of property without due process of law. . . ." (Record, at p. 34 et seq.)

Thus, the federal constitutional issues relating to

1. The Interstate Commerce Clause;

2. The Due Process Clause; and

3. The Equal Protection of the Laws Clause

were the sole questions in this case. These questions were squarely raised in the original pleadings and were actively at issue throughout. The trial court held that the Louisiana tax statute was invalid, as offensive to the United States Constitution under all three clauses, and granted the refund sought (\$43,325.63). The Louisiana Supreme Court reversed and upheld the Louisiana tax statute as valid, finding that it does not offend any constitutional rights of the taxpayer. From this latter ruling, Halliburton has appealed to this Court.

### SUMMARY OF ARGUMENT

The Louisiana Collector of Revenue has boldly taken the position that Louisiana may levy an excise tax upon the privilege of engaging in interstate commerce.

The Louisiana Sales Tax (2%) falls only upon transactions which occur wholly within Louisiana's borders.

The Louisiana Use Tax (2%) is levied upon the use, in Louisiana, of tangible personal property acquired outside the state and brought into the state, across the state line, and used in Louisiana.

The "compensating use tax" was found necessary (in Louisiana and elsewhere) in order to prevent citizens of the state from going outside the state to make their major purchases, thus avoiding the sales tax levied on intrastate sales. The use tax, complementary to the sales tax, was designed to prevent tax discrimination against intrastate business.

Although such a Use Tax falls only upon transactions in which the element of interstate commerce is involved, this type of tax has been upheld as constitutional and as inoffensive to the commerce clause, the due process clause, and the equal protection clause of the Federal Constitution, **because** (in the case then at bar—the use tax was precisely equal to (and did not exceed) the sales tax of the same state, to which the use tax was complementary. *Henneford v. Silas Mason Company*, 300 U.S. 577, 57 S.Ct. 524, 81 L. Ed. 814 (1936). The use tax was thus upheld **because**, in the *Henneford* case, the use tax **did not discriminate** against the interstate transaction.

It is appellant's position that, in any case where the (interstate) **use tax** burden is heavier than the (intrastate) **sales tax** burden would be (in a case identical except for the element of interstate movement), then the use tax **does discriminate** against the interstate transaction and, because of such discrimination, is violative of the Federal Constitution.

Appellant submits that, where the application and interpretation of the Louisiana Sales and Use Tax Statute is such that the Louisiana Collector may levy a burden of the tax only upon those who come into Louisiana from other states, thus giving a direct commercial advantage to local business, then said application of the statute offends the Federal Constitution.

Restated: Where the multi-state operator, who moves his goods across state lines, is subjected to a greater tax burden than that of his intrastate competitor (in precisely the same business operation), then said tax burden is a direct interference with the free flow of commerce between the

states, and is a tax upon the privilege of engaging in commerce which crosses state lines. Such a tax is unconstitutional.

### **How the Issue Arises:**

Discrimination against the out-of-state operator, and in favor of his intrastate competitor, arises here on two sets of operative facts. In each situation it is important to remember that Halliburton brings tangible personal property into Louisiana **for its own use**. It does not sell such property.

**First:** Halliburton brought into Louisiana certain oil field equipment which it had manufactured at its own production shops in Duncan, Oklahoma. As to such property, Halliburton is a "manufacturer-user."

Question: Whether such an out-of-state manufacturer-user (producer-consumer) may be required to pay a 2% use tax upon the labor-and-shop-overhead element of the cost of the equipment, when—at the same time—an identical manufacturer-user, whose production shops were located in Louisiana, would not be required to pay any tax (sales or use) on this labor-and-shop-overhead element of his cost?

**Second:** Halliburton purchased (in New York) an airplane and it purchased (in Texas) certain oil field equipment. It then brought the plane and equipment into Louisiana, and used it there. Both purchases were made from concerns which were not regularly engaged in the business of selling such equipment. Such "Isolated Sales," if made in Louisiana, are specifically exempted from the Louisiana Sales Tax. If Halliburton had purchased the properties in such an "isolated sale" in Louisiana, from a Louisiana vendor, there would have been no sales tax on the transaction. So, also, if the New York

vendor and the Texas vendor, had brought property into Louisiana—to the Louisiana market-place—and if Halliburton had made its purchases in Louisiana, there would be no 2% tax paid by anyone under the Louisiana Sales and Use Tax Statute. Thus, where the purchaser-user (Halliburton) engaged in no multi-state activity and no interstate movement of goods, the purchaser-user is not required to pay this excise tax.

Question: Can Halliburton, the purchaser-user, be required to pay the additional 2% Use Tax as a penalty for having elected to go outside the State of Louisiana, to find a vendor and to make the purchase of the property? Can Louisiana discourage Halliburton (by such a 2% tax) from going outside Louisiana, in its search for such a vendor. Can the interstate movements of the purchaser (Halliburton) and the movement of goods in interstate commerce, by the purchaser, properly give rise to a Louisiana excise tax burden (upon the purchaser) which would not have existed if the purchaser had confined himself to the Louisiana market-place?

Halliburton, appellant, submits that both of the foregoing questions must be answered in the negative. In both cases, Louisiana would place the incidence of the additional tax burden upon the act of crossing the state line by the taxpayer. In each case, Louisiana would exempt from the excise tax the taxpayer (in Halliburton's position) who confined himself wholly to the territory within Louisiana's border lines. In each case, Louisiana would demand the tax of the taxpayer (in Halliburton's position) who dared cross the state line.

Because Halliburton selected the site for its production shops in Oklahoma, Louisiana would demand a 2% use tax on the labor-and-shop-overhead element of cost of equipment. If

Halliburton had its shops in Louisiana, no such tax would be due.

Because Halliburton elected to go outside the Louisiana market-place to purchase the plane and equipment (in the "isolated sales"), Louisiana would demand a 2% use tax on the cost of these items. If Halliburton had confined itself to Louisiana (in its search for such vendors) and had purchased the properties in the Louisiana market, no such tax would be due.<sup>1</sup>

In both cases, the distinguishing element of fact is the multi-state activity (of Halliburton) and the interstate movement of property (by Halliburton). There is no other distinction whatsoever. None has ever been suggested by anyone.

In both cases, Louisiana would "discriminate against interstate commerce by giving a direct commercial advantage to local business." Louisiana would lay an excise tax upon the privilege of engaging in interstate commerce.

Halliburton submits that such direct interference with the free flow of interstate commerce is unconstitutional and that it ought to be forbidden by this Court.

## ARGUMENT

### The Law:

In the landmark decision in the *Northwestern States Portland Cement Company* case (1959)<sup>2</sup> this Court held that a state may levy a **non-discriminatory** net income tax upon con-

<sup>1</sup> Note the two aspects of the discrimination: (1) Halliburton is taxed solely because it crossed the state line; (2) there is discrimination against out-of-state vendors, in favor of the local market.

<sup>2</sup> *Northwestern States Portland Cement Company v. Minnesota*, and *Williams v. Stockholm Valves & Fittings, Inc.*, 358 U. S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421, 67 ALR 2d 1292 (1959).



cerns which had theretofore claimed exemption therefrom under the Interstate Commerce clause of the Federal Constitution.

In zealous exercise of its new found freedom to tax the interstate operator, Louisiana now asserts its right to levy an excise tax upon an interstate operation which is heavier and more burdensome than the same tax would be upon the identical operation if it were conducted wholly within the state border lines. Louisiana frankly asserts that it may discriminate against the interstate business and tax it more heavily than its purely intrastate competitor.

Your Honors did not authorize such discrimination. In the *Portland Cement Company* case, this Court took occasion to summarize the law in this field, and said:

"From the quagmire [of prior decisions] there emerge, however, some firm peaks of decision which remain unquestioned.

"It has long been established doctrine that the **Commerce Clause** gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless **requires that interstate commerce shall be free from any direct restrictions or impositions by the States.** *Gibbons v. Ogden*, (US) 9 Wheat 1, 6 L ed 23 (1824). In keeping therewith a State 'cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose' such as itinerant drummers. *Robbins v. Shelby County Taxing Dist.* 120 US 489, 493, 494, 30 L ed 694, 696, 7 S. Ct. 592 (1887). Moreover, **it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging** in interstate commerce, *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 95 L ed 573, 71 S. Ct. 508 (1951). Nor may a State impose a tax which dis-

criminales against interstate commerce either by providing a direct commercial advantage to local business, *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 96 L. ed 436, 72 S. Ct. 424 (1952); *Nippert v. Richmond*, 327 U. S. 416; 90 L. ed 760, 66 S. Ct. 586, 162 ALR 844 (1946), or by subjecting interstate commerce to the burden of 'multiple taxation,' *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 98 L. ed 583, 74 S. Ct. 396 (1954); *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L. ed 1365, 58 S. Ct. 913, 117 ALR 429 (1938). Such impositions have been stricken because ~~the States~~, under the Commerce Clause, are not allowed 'one single-tax worth of direct interference with the free flow of commerce.' *Freeman v. Hewitt*, 329 U. S. 249, 256, 91 L. ed 265, 274, 67 S. Ct. 274 (1946)." (358 U. S. at p. 427, Emphasis supplied)

Appellant, Halliburton, adopts the foregoing as its summary of the applicable law, and cites as its authorities those cited by this Court, in the above quotation. Upon this statement of the law, Halliburton rests.

Appellant submits that Louisiana is here levying an excise tax upon the "privilege of engaging in interstate commerce." Appellant submits that the tax here at issue clearly "discriminates against interstate commerce . . . by providing a direct commercial advantage to local business"; that the Louisiana Collector's position is an open flaunting of the prohibitory language of this Court, above quoted.

### **The Discrimination:**

The Louisiana Collector has stipulated that he would discriminate. He demands the use tax from Halliburton (to the extent of some \$40,000) while stipulating frankly that, if Halliburton conducted its entire operation in Louisiana (in-

stead of partially in other states and partially in Louisiana), he would not be demanding any tax money at all.

We quote from the Collector's stipulations relating to both phases of this case:

**First: The Labor and Shop Overhead Phase—**

**"If Halliburton had . . . operated . . . at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on materials purchased outside Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead." (R. 26-27)**

**Second: The Isolated Sale Phase—**

**" . . . the entire . . . [purchase price] would not have been subject to the Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made within the State of Louisiana." (R. 30)**

The Collector stipulates that, if this were a purely Louisiana (intrastate) operation, the excise tax would not be demanded. Yet he demands it in this case. And the Louisiana Supreme Court has held that the added element of interstate activity and interstate transportation properly gives rise to the additional tax. Louisiana frankly discriminates against interstate commerce " . . . by providing a direct commercial advantage to local business. . . ."

## The Decision of the Louisiana Supreme Court—

Halliburton submits that the situation here is of surpassing simplicity and clearness, viz.,

- I. It is the law, stated by this Court, that a state may not, by its taxes, discriminate against interstate commerce by providing a direct commercial advantage to local business. *Portland Cement* case, *supra*.
- II. The Collector has stipulated that the excise tax he demands here would not be due "... if Halliburton ... operated at a location within the State of Louisiana."

How, then, could the Supreme Court of Louisiana possibly conclude that the tax does not discriminate against, and burden, interstate commerce? How could it conclude that no "direct commercial advantage" is given to the purely local operator?

It is difficult to get at the heart of the Louisiana decision. Its language strikes only glancing blows at the problem.

First, the Court points out that the Collector would treat the use tax as if it were a property tax. We quote:

"The Collector urges that the district court erred in not finding that the incidence of the Louisiana Use Tax is non-discriminatory; that it is equal in its application because it is upon the use of tangible personal property after it has been withdrawn from commerce; that the combined effect and purpose of the Sales Tax and Use Tax is to insure that all tangible personal property used

or consumed in the State of Louisiana bears a 2% tax, either at the time of its original sale at retail in the state or at the time of its first use in the state if a 2% sales tax has not already been paid by the user to any other state."

Of course, it is settled that the use tax is not a "property tax." It is an excise tax upon the privilege of using. The Louisiana Supreme Court concedes this and quotes from the *Hennelord* case,

"The [use] tax is not upon operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, **non-discriminatory in its operation**, when they have become part of the common mass of property within the state of destination.

• • •

"For like reasons they may be subjected, when once they are at rest, to a **non-discriminatory** tax upon use or enjoyment.

• • •

"A **non-discriminatory** tax upon local sales . . . has never been regarded as imposing a direct burden upon interstate commerce. . . ." (127 So. 2d, at p. 508)<sup>2</sup>

<sup>1</sup> Even if a "property tax" approach could be fairly adopted, this would not eliminate the open "discrimination." The *property tax* would be greater, if the labor and shop overhead element of "cost" were incurred outside Louisiana, than it would be if the construction and assembly work were done in Louisiana.

<sup>2</sup> R. 43-44.

Then the Louisiana Court (ignoring the matter of "discrimination") said:

"We conclude that . . . the use tax as applied to the plaintiff [Halliburton] does not infringe upon the regulation of interstate commerce by Congress. The taxed matter had definitely come to rest in Louisiana and had acquired a situs in the State." (at pp. 508-509)<sup>1</sup>

Next, addressing itself to the question of discrimination, the Louisiana Court said:

"Plaintiff endeavors to set forth the alleged inequality of the use tax as applied to it by arguing that if a local oil well servicing company had manufactured its own equipment in Louisiana it would only have had to pay a sales tax on the component parts employed, whereas plaintiff has been assessed a use tax not only on the component parts but also on the cost of labor and shop overhead. Plaintiff argues, as set forth, supra, that its burden, as compared to that of a local taxpayer, is so unequal as to constitute a violation of the 14th Amendment to the United States Constitution and of Article I, Section 2, of the Constitution of Louisiana." (at p. 509)<sup>2</sup>

Then the Louisiana opinion quotes Cooley on Taxation,

viz.,

"What does 'equal protection of the laws' mean as applied to taxation? Equal protection cannot be said to be denied by a statute which operates alike on all persons and property similarly situated, or by proceedings for the assessment and collection of taxes which follow the course customarily pursued in the state." (at p. 509)<sup>3</sup>

<sup>1</sup> R. 4.

<sup>2</sup> Ibid.

<sup>3</sup> R. 46.



Finally the Louisiana Supreme Court simply concludes that the Louisiana tax (although it falls more heavily upon the interstate operator) is not "discriminatory" because the discrimination is only "incidental"! The Court put it this way:

"We do not find that the Louisiana Use Tax treats any person differently from any other person in a like circumstance. All users are subjected to the same rate of tax; there is no arbitrary or unreasonable distinction. The law contains no hostility nor discrimination; it singles out no class of persons as subjects for its assessment.

"We do not find that the use tax as herein applied imposes an unconstitutional burden on plaintiff. Plaintiff's comparison, *supra*, is not apposite. There must be an incidence of taxation; there must be an occurrence which brings the use tax into effect. In order to have an imposition of a sales tax, there must be a sale. Likewise, to have a levy of a use tax, property must come to rest in the State after leaving interstate commerce, and there must be a user of the property in the State. In the instant case, the fabricated product was transported to, came to rest in, became part of the common mass of property in, and was used in Louisiana. The proper comparison would be between the use tax on the assembled equipment and a sales tax on the same equipment if it were sold. What takes place before the fabricated product leaves interstate commerce and enters the State of Louisiana to rest is not within the contemplation of the statute except for the determination of cost price. **Labor and shop overhead are considered incidentally together with other items as a basis for arriving at cost.**" (at p. 510)<sup>1</sup>

With reference to whether or not the 2% use tax can be put upon the Labor and Shop Overhead element of cost (which

<sup>1</sup> R. 46-47.



is the only issue in this phase of the case), the Court thus concludes:

"What takes place before the fabricated product leaves interstate commerce . . . is not within the contemplation of the statute **EXCEPT** for the determination of cost price.

"Labor and shop overhead are considered **incidentally** together with other items as a basis for arriving at cost." (at p. 510)<sup>1</sup>

Of course, the only issue at all here is whether or not it is discriminatory to include the labor and shop overhead (whether "incidentally" or otherwise), in the "determination of cost price," for purposes of the use tax calculation. It is the "determination of cost price" which fixes the tax.

The Louisiana court does not, and cannot, come to the point and say "We **include** the labor and shop overhead in the tax base for interstate operators. We **exclude** the labor and shop overhead from the tax base for local (intrastate) operators. Yet this is not discrimination. We give no 'direct commercial advantage to local business' as prohibited by the federal constitution."

Since the Louisiana court cannot face-up to the issue without such a resulting absurdity, the Court sideswipes the issue and says that:

"What takes place . . . [in] interstate commerce is not . . . [considered] . . .

". . . **EXCEPT** for the determination of cost price . . .

<sup>1</sup> R. 46-47.

"Labor and shop overhead are considered [only] incidentally . . . ."

What Halliburton precisely complains of is the inclusion of an item (labor and shop overhead) in the tax base (in the "determination of cost price") where there is a multi-state transaction, whereas the same item (labor and shop overhead) is—~~incidentally—excluded~~ from the tax base in the purely intra-Louisiana situation.

Specifically, Halliburton says that Louisiana is here demanding \$40,000 in tax moneys while, simultaneously, stipulating that

"If Halliburton had . . . operated . . . at a location within . . . Louisiana . . .

"there would have been no . . . tax . . . ." (R. 58)

Let us suppose that Halliburton set up its construction shops in Texas, immediately adjacent to the Louisiana state line. And, let us suppose that a competitor of Halliburton (in exactly the same business) set up its shops just inside the Louisiana line, with a white-washed fence along the state line separating the two operations. When the Louisiana operator produced and used his equipment in Louisiana (a purely intra-state operation), there would be no tax on the labor and shop overhead element of cost. See stipulations. But for each piece of equipment which Halliburton produced on the Texas side (and then brought into Louisiana across that white-washed fence line), Louisiana would demand the two-per-cent tax on the labor-and-shop overhead element of the cost. The two operations would be identical, but—says Louisiana—the move-

ment of the equipment across that state line is enough to give rise to the additional two-per-cent tax. This is the Louisiana Collector's avowed position.<sup>1</sup>

With reference to the "Isolated Sale Phase," the Collector has similarly stipulated that, but for the element of interstate transportation, he would not be demanding the tax. The stipulation is that

"... the entire . . . [purchase price] . . . would not have been subject to the Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made in Louisiana." (R. 61)

If Halliburton had bought the casually purchased airplane at Moisant Airport, in New Orleans, so that the sale was a Louisiana transaction, it is stipulated that there would be no two-per-cent tax under the Louisiana Sales and Use Tax. Yet, because Halliburton went beyond the Louisiana market, and purchased the airplane in New York and then moved it into Louisiana, the two-per-cent tax (under the same statute) is demanded. Clearly, it is only the element of interstate transportation, by this taxpayer, which differentiates the two factual situations. The Collector would levy an import tax upon the use of goods so purchased.<sup>2</sup>

<sup>1</sup> Note the 2% inducement to establish the production shops in Louisiana.

<sup>2</sup> Note sharply this fine distinction. Only if the purchaser (the party in Halliburton's position) engages in the interstate activity is this additional use tax demanded. If the vendor performs the interstate transportation, and the "isolated" sale is made in Louisiana (on the Louisiana market) there is no sales or use tax to be paid, either by vendor or by purchaser. But, if the purchaser goes outside the state, moves across the state line (and takes title outside the state), then upon the bringing of the property into the state, by the purchaser, Louisiana demands a use tax of the purchaser. The use tax is demanded of the purchaser only if the purchaser (himself) engaged in interstate movement of goods.

Yet the Louisiana Court brusquely disposes of this phase of the case by stating:

"... we do not feel constrained to follow the *Alabama* case ... because we find that the instant matter does not involve a question of interstate commerce." (R. 49)

"... we find no discrimination nor deprivation of property without due process of law." (R. 49)

Nevertheless, the fact remains that Louisiana demands that Halliburton pay \$40,000 in taxes while stipulating that Halliburton would not have to pay the tax "... if Halliburton had ... operated ... at a location within the State of Louisiana," (R. 26-27) and the transaction would be "... not subject to ... tax had the purchase been made in Louisiana." (R. 30)

### **The Decision in Alabama—**

*In-State v. Bay Towing & Dredging Company, Inc.*, 265 Ala. 282, 90 So. 2d 743 (1956), the Supreme Court of Alabama considered an "isolated sale" case exactly like the present case, except that the property involved in the "isolated sale" consisted of five barges.

The doctrine of the *Bay Towing* case is summarized in its syllabi, from which we quote:

Syl. 3. Commerce Key 63

"If state-use tax is construed as imposing a tax on use in the state of tangible personal property purchased out-

side the state in casual and isolated sales transactions, such tax would constitute an unlawful discrimination against interstate commerce, contrary to commerce clause of the United States Constitution, in view of the fact no similar or equivalent tax burden is imposed in isolated sales transactions within the state. Code 1940, Tit. 51, § 788; U.S.C.A. Const. art. 1, § 8, Cl. 3." (90 So. 2d at p. 743)

Syl. 4: Commerce, Key 63

"If a state use tax integrated with a sales tax places a discriminatory burden upon transactions in interstate commerce, and such burden would not apply to local sales, use tax would become unconstitutional in its operation as violative of commerce clause of Federal Constitution. Code 1940, Tit. 51, Sec. 753, 788. U.S.C.A. Const. art. 1, Sec. 8, cl. 3."

In striking down the Alabama use tax, the Alabama Supreme Court said:

"The position taken by the state is that § 788, Tit. 51, as amended, supra, requires that the tax be paid on tangible personal property purchased outside of the state and brought within the state for storage, use or consumption whether the seller of such property is engaged in the business of dealing in such property or not; that the wording of Section 788 shows such to be the clear legislative purpose. On the other hand, Bay Company's insistence is that the sales tax and the use tax are complementary, one to the other; that the two laws must be construed together as one integrated, cohesive system of taxation; that unless property would be subject to the sales tax, had the sale occurred within this state, then the use tax cannot apply when the sale occurs without the state;

that the property here involved would not be subject to the sales tax had the sale taken place here, and hence is not subject to the use tax. The trial court sustained Bay Company's contention, in which we concur.

"(1,2) While the sales tax is levied on the transaction of sale itself and the use tax on the use of property after the sale is completed, it seems clear that the legislature intended that these two tax laws be considered together as embodying **one integrated, cohesive system of taxation.** We have held them to be **complementary, one to the other,** and that the two acts should be construed in pari materia. *State v. Advertiser Co.*, 257 Ala. 423, 59 So. 2d 576; *Paramount-Richards Theatres v. State*, 256 Ala. 515, 55 So. 2d 812; *State v. Southern Kraft Corp.*, 243 Ala. 223, 8 So. 2d 886; *Layne Central Co. v. Curry*, 243 Ala. 165, 8 So. 2d 839. The purpose and effect of the two laws is thus succinctly stated in *Paramount-Richards Theatres v. State*, supra (256 Ala. 515, 55 So. 2d 820):

"The measure of the tax under the Sales Tax Act is the retail sales price of the goods; and under the Use Tax Act the measure of the tax is likewise the retail sales price of the goods.

"The intent and result of this legislation is to impose a sales tax on sales which occur within the state, and a use tax (so called) measured by the retail sale price of goods purchased outside the state for use within the state. **For these reasons these two acts are referred to as being complementary, one to the other. The Use Tax Act is referred to as a compensatory measure,** to equalize the burden of the sales tax and prevent avoidance of the tax by the purchase of goods in interstate commerce or from outside of the state. \* \* \*

"(3) As we see it, if the use tax is construed as imposing



a tax on the use in this state of tangible personal property purchased outside the state in casual and isolated sales transactions, such tax would constitute an unlawful discrimination against interstate commerce, contrary to the Commerce Clause of the United States Constitution, Const. art. 1, § 8, cl. 3, since no similar or equivalent tax burden is imposed in connection with the purchase of such property in casual and isolated sales transactions within the state. This principle was recognized in *Paramount-Richards Theatres v. State*, supra, where it was said:

"If the legislature had imposed a rental tax only upon property shipped into the state in interstate commerce or purchased outside of the state, it would constitute a direct discrimination against interstate commerce, and such provision would therefore be invalid as being in conflict with the interstate commerce clause in the Constitution of the United States; art. 1, § 8, cl. 3. \* \* \*

"(4.5) The United States Supreme Court has held that a use tax, integrated with a sales tax, in a manner similar to ours, is **not violative** of the Commerce Clause **when such system of taxation does not discriminate against transactions in interstate commerce**, but merely equalizes the burden of taxation on purchases made in interstate commerce and on strictly local sales. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814. Cf. Annotation, 129 A.L.R. 222; Annotation, 153 A.L.R. 609; Note, 54 Colm.L.Rev. 261. **However, if such a system of taxation places a discriminatory burden on transactions in interstate commerce, which would not apply to local sales, the use tax would become unconstitutional in its operation.** *Paramount-Richards Theatres vs. State*, supra; *Anderson v. Mullaney*, 9 Cir., 191 F.2d 123, 129, affirmed. 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458, *Best & Co. v. Maxwell*, 311 U.S. 454, 455, 61 S.Ct. 334, 85 L.Ed. 275;



Hale v. Bimco Trading Co., 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771. As said in Best & Co. v. Maxwell, supra (311 U.S. 454, 61 S.Ct. 335):

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. . . ."

"It seems clear to us that if the sales of the barges had taken place in Alabama there would be no sales tax due because the barges were purchased in 'casual' or 'isolated' sales transaction from concerns not engaged in the business of selling barges but engaged solely in the business of hauling for hire. Therefore, if the use tax act should be construed as imposing the tax on 'casual' and 'isolated' sales in interstate commerce there would result a clear discrimination against such sales." (90 So. 2d at pp. 746-747)

"... in the instant case if Bay Company had bought the barges in Alabama, there would be no sales tax due. Accordingly, if the use tax act should be construed as imposing a tax there would be, as a result, a clear discrimination against Bay Company's interstate sales transactions. . . ." (at p. 748)

#### **The Rule in North Dakota, Ohio and California—**

It is clear that North Dakota and Ohio are in accord with Halliburton's position, and would follow the Alabama decision. Further, the Supreme Court of California has clearly indicated that it also disagrees with the conclusion of the Louisiana Supreme Court.

**North Dakota:**

A similar question, re "labor and shop overhead," arose in North Dakota, under Rule No. 55 of the Sales Tax Rules and Regulations. Under date of August 6, 1956, the Office of the Tax Commissioner, through its counsel, Kenneth M. Jakes, rendered the following unpublished opinion:

"As noted by you sales tax rule No. 55 provides that if a contractor or subcontractor manufactures part of the articles used or consumed by him in carrying out his contract, he will be liable for the sales tax of two percent on the cost of manufacture of such articles."

"... the sales tax does not provide for taxing labor or manufacturing or fabricating costs other than materials used by such a manufacturer or fabricator who is also the ultimate consumer."

"If these amendments are construed so as to impose a use tax on the total cost of only those items fabricated or manufactured outside this state by a contractor for his use in this state but not on the total cost of similar items fabricated or manufactured in this state by the contractor from materials purchased outside the state, then I believe there is discrimination on the basis of origin of the finished product such as would be repugnant to the privileges and immunities' and 'equal protection' clauses of the fourteenth amendment to the Federal Constitution and to section 2 of Article 4 of the Federal Constitution relating to privileges and immunities of citizens of each state. See Ex Parte Smith, 100 Fla. 1, 128 So. 864, and cases cited therein, and 16A C.J.S. 226-227."

"If these amendments are construed so as to impose a use tax on the total cost of all items fabricated or manufactured within or outside this state out of materials purchased outside this state by such a contractor, then there is no discrimination insofar as the use tax alone is concerned. However, as to similar items fabricated or manufactured in this state by such a contractor out of materials purchased in this state, the contractor would be liable only for a retail sales tax on the cost of the materials used in manufacturing those items.

"There is a serious question whether such an interpretation would not also constitute an illegal discrimination or arbitrary and unreasonable classification when it is considered that the sales and use tax laws must be construed together because they are in *pari materia*. Since section 57-4003, N.D.R.C. 1943, declares the use tax law to be supplemental to the retail sales tax law, they must be construed together.

. . .

"Considering the serious constitutional considerations involved and the legislative purpose of providing a single comprehensive plan of taxation through a retail sales use tax law, it is my conclusion that 'total cost' as used in the 1955 amendment to subsection 5 of section 57-4001 **should be construed to mean only the cost of materials** used in fabricating, compounding, or manufacturing tangible personal property by a person for storage, use, or consumption **by that person.**

In accord with the foregoing, the North Dakota Tax Commissioner, in 1957, amended his Rules No. 55 and No. 113, so

as to eliminate the labor and shop overhead element from the tax base of the use tax.

**Ohio:**

The Ohio Department of Taxation has come to the same obviously correct conclusion. The burden of the use tax (upon the interstate transaction) cannot exceed the sales tax (upon the similar intrastate transaction), so that **IF** the sales tax does not reach the "labor and shop overhead," the use tax must also exclude from the tax burden the element of "labor and shop overhead."

Section 5741.01(D) of the Ohio General Code, CCH All-State Sales Tax Reporter, paragraph 60-206, provides that the terms "purchase" includes production even though the article produced was used, stored or consumed by the producer, and section 5741.01(G), CCH paragraph 60-209, provides that "if a consumer produces the tangible personal property used by him, the price is the usual and ordinary consideration paid for such tangible personal property." These provisions appear in the Ohio use tax law, but there are no corresponding provisions in the sales tax law, and the cases of *Wellnitz v. Evatt*, 19 Ohio Opinions 330, and *Volk v. Evatt*, 26 Ohio Opinions 417, make it clear that under the sales tax law **a fabricator-contractor is a consumer, taxable only on the purchase price he pays for raw materials**, unless he agrees to furnish fabricated material for one price and to do his construction work for a separate price. In view of these circumstances the Ohio Department of Taxation has issued Circular No. 18 dated March 1, 1954, CCH Ohio State Reporter, paragraph 60371.70, which states the position of the Ohio Department of Taxation to be as follows:

## .70 Tax base for producer-consumer<sup>1</sup>

"In the case of consumer who produces the tangible personal property used by him, the tax base is the usual and ordinary consideration paid for such tangible property.

"It is the position of the Department that the 'usual and ordinary consideration paid **'shall be construed to mean the cost of the raw material to the producer-consumer so as to place such a person in the same category under both the sales and use tax laws and avoid the discrimination that would otherwise exist as to a non-resident producer-consumer.'**"

We respectfully submit that the position of the Ohio authorities is sound.

### California:

In *Chicago Bridge & Iron Company v. Johnson*, 19 Cal. 2d 162, 119 P. 2d 945 (1941), the ~~California Use Tax~~ was upheld as constitutional, as applied to fabricated products imported into California and used there by the fabricator. But the California Court—in so holding—found it<sup>2</sup> necessary to point out specifically that:

"The fallacy of this argument [re unconstitutionality] lies chiefly in its inaccurate assumption . . .

"It is quite true that the tanks, or the completed but unassembled parts, which were shipped into this state were not purchased by the plaintiff in that form; they were manufactured by it. It acquired the raw materials

<sup>1</sup> Hereinafter, we have pointed out that Halliburton is unquestionably a "manufacturer-user," or "producer-consumer."

out of which it manufactured or fabricated those completed parts, and it is upon the storage and use of those materials upon which the tax is based.

**"The tax was computed upon the cost, that is, the sales price of those materials to plaintiff, and that is the price which it paid for them."**

**"The fabrication and construction of these materials into the completed article undoubtedly enhanced their value, BUT the tax is NOT calculated on that value. It is based on the sales price to plaintiff of the materials which were used to fabricate the finished product, which materials were undoubtedly purchased by plaintiff."** (119 P. 2d at p. 948)

Thereupon the Supreme Court of California concluded:

**"The use tax as applied to plaintiff does not impose a prohibited regulation or burden on interstate commerce."**  
(at p. 949)

In reaching its decision the California court cited the provision of the California Use Tax statute which (like the Louisiana statute) announced that the state tax was not intended to reach transactions forbidden to it by the Constitution of the United States.

From this opinion, we submit, two things are clear. (1) The California Use Tax statute has been held constitutional **because** it was construed to exclude the "labor and shop overhead" element from its base, and (2) If the California use tax had not been thus construed, it would have been held unconstitutional as "discriminatory."



### A Summary of the Rule—

Appellant knows of no published writing, of any sort, anywhere, which supports the position of the Louisiana Collector, except the decision from which appeal is here made. The uniform rule supports appellant here.

In reviewing the jurisprudence and history of use tax legislation, the author of a recent treatise, *Hartman, State Taxation of Interstate Commerce*, sets out the nature and purpose of this legislation as follows:

"The residents of a State which has a sales tax likely will confine most of their minor purchases to local stores. They are apt, however, to go bargain hunting outside the State for their major purchases. The unfortunate result of such bargain hunting abroad is not merely a short-changing of the state's coffers, but local merchants whose transactions are subject to the local sales tax find themselves at a competitive disadvantage with an extra-state seller whose sales are subject to no sales tax. The legislatures of the States having a sales tax could not plug these economic leaks by extending the reach of the sales tax."

"It was to this sort of bargain hunting that the compensating use tax was directed.

"Compensating use tax statutes take the form of a levy on the privilege of using property within the taxing States, which would have been subject to sales tax had it been purchased within the State. The compensating use tax rate is the same as the local sales tax levy, and provision is made that no article on which a sales or use tax has once been paid shall again be subject to the use tax. The compensating use tax is thus geared as comple-



mentary to the local sales tax." (p. 161. Emphasis supplied)

Then, almost in words-of-one-syllable, Hartman states that the rule must be that for which appellant here contends:

"While the compensating use tax has been uniformly cleared of any discriminatory effects, in reaching that conclusion the Court has made an assumption that may be open to some question from an economic standpoint. An assumption by the Court that the tax burden on the consumers of locally bought goods is at least equal to the use tax burden on purchasers of out-of-state goods seems necessarily implicit in the finding that the compensating use tax does not discriminate against interstate commerce. **For, only if there is an equivalency of tax burden on the two types of purchases can it be said that the purchasers of out-of-state goods are not discriminated against.** (Emphasis supplied. At p. 167)."

#### **Louisiana Plans Further Discrimination:**

Louisiana Act 51 of 1959<sup>1</sup> amended the Sales Tax act to exempt from the sales tax materials and supplies going into vessels "built in Louisiana shipyards," as well as the gross sales prices of such vessels when sold by the builders thereof.

The Louisiana Collector of Revenue would discriminate, however, against a vessel built outside Louisiana, and then brought into Louisiana across the state line. He asserts that as to such a vessel, moved in interstate commerce, Louisiana has the right to collect a use tax measured by the full construction cost price of the vessel. Of course, this is a forthright attempt to give Louisiana shipbuilders a commercial advantage over competitive shipyards in other states.

<sup>1</sup> La. R.S. of 1950, 47:305.1 *Infra*, p. 82.

At the Tulane Institute of Mineral and Tidelands Law, Nov. 14, 1959, Mr. Charles D. Marshall of the New Orleans bar summarized the situation:<sup>1</sup>

**"APPLICATION OF THE LOUISIANA USE TAX TO PROPERTY  
ACQUIRED IN OTHER STATES**

"The original justification for the use tax was the necessary protection of the state and its commercial enterprises against out-of-state purchasing to avoid the sales tax. Thus, the use tax has many times been said to be a complement of the sales tax. Constitutionality of the use tax was sustained by the United States Supreme Court on that basis. In *Henneford v. Silas Mason Co.*, that Court said:

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists. . . ."

"While it is difficult to form a logical pattern out of all the decisions of the United States Supreme Court, there is one thought which has been expressed again and again in those decisions, and that is that a state cannot by its tax laws discriminate against interstate commerce.<sup>2</sup> If a state did not have a sales tax law at all, but imposed only a use tax on property imported from another state, the discrimination against interstate commerce would be

<sup>1</sup> Mr. Marshall's address is reproduced in XXXV Tulane Law Review 183.

<sup>2</sup> *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), and *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), are important illustrations.

too obvious for argument.<sup>1</sup> If, instead, such state did have a general sales tax law but exempted certain property when it was bought within the state while taxing the use of the same exempted property when it was bought outside the state, the principle is the same. The use tax would be discriminatory because of the unequal exemptions.

**As a matter of principle, then, the use tax can never be any broader in its application to property imported into Louisiana than would the sales tax be if the property were purchased here in the first place.** The regulations under the Louisiana sales tax seem to agree: they contain a general statement that the use tax applies only where the sales tax would apply if the property had been sold in this state.<sup>2</sup> The Louisiana Supreme Court has used broad language to the same effect.<sup>3</sup> There are strong implications in the law itself to that end.<sup>4</sup> Nevertheless, the Department of Revenue is contending in at least two situations that the use tax is broader than the sales tax.

**"In the first situation, the Department maintains that even though, prior to the 1959 Statute, sales tax might not have been due upon the construction of a vessel in Louisiana, nevertheless, in the case of a vessel built outside Louisiana and brought into Louisiana, the state has the right to collect a use tax measured by the full construction price of the vessel.** The attorneys for the Department of Revenue advised that they have been suc-

<sup>1</sup> See *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952); *Walling v. Michigan*, 116 U.S. 446 (1886), for statements of the controlling principle.

<sup>2</sup> Regulations, art. 2-3.

<sup>3</sup> *Chrysler Corp. v. New Orleans*, 238 La. 123, 114 So.2d 579 (1952); *Fontenot v. S. E. W. Oil Corp.*, 232 La. 1011, 95 So.2d 638 (1957); *Mouledoux v. Maestri*, 197 La. 525, 2 So.2d 11 (1941).

<sup>4</sup> La. R.S. of 1950, 47:303, states that the importer shall pay a use tax "the same as if the said articles had been sold at retail for use or consumption in this state."

cessful in collecting substantial amounts of taxes under that approach. It is nevertheless the belief of the writer that the Department of Revenue cannot succeed in court with that approach, because, as a matter of statutory interpretation, the Louisiana use tax does not have a broader application than the sales tax, and further, even if it did, the use tax would to that extent be a plain discrimination against interstate commerce.

"The second instance in which the representatives of the Department of Revenue claim that the use tax is broader than the sales tax is with regard to the casual sales. In Louisiana, the sales tax does not apply to an isolated or occasional sale by a person not engaged in the business of making such sales.' However, the Department of Revenue maintains that there is no such thing as a 'casual use.' Thus, if one buys a drilling rig in Texas from a casual seller and takes delivery of it in Texas, the subsequent importation of the rig into Louisiana will result in a claim of use tax. Yet, if the sale had been made locally in Louisiana, where it would qualify as a casual sale for sales tax purposes, the Department would admit the transaction to be exempt. Discrimination against interstate commerce is evident in this position also."

"In line with its attitude on these other issues, the Department of Revenue will, no doubt, try to collect use tax on vessels of fifty or more tons load displacement built outside Louisiana and imported into the state after enactment of Act 51 of 1959. It will be recalled that the 1959 Statute only extends its favors to vessels 'built in Louisiana.' As in the two instances discussed above, that requirement constitutes a discrimination against interstate commerce. The consequence is that the words 'built in

<sup>1</sup> La. R.S. of 1950, 47:301.

<sup>2</sup> *State v. Bay Towing & Dredging Co.*, 265 Ala. 282, 90 So.2d 743 (1956). Litigation on this issue is now pending in the Louisiana courts.

Louisiana' will have to be regarded as not written. Vessels built outside Louisiana must be entitled to the same privileges and exemptions as are the ones which have been built here. It may take litigation to settle the issue but the proper result seems reasonably clear.

"If it is correct that the materials used in repairs to vessels built in Louisiana are exempt, then, the provisions of the 1959 statute notwithstanding, the same exemption must, in order to avoid discrimination against interstate commerce, run in favor of vessels built outside Louisiana, provided, of course, such vessels are of the necessary qualifying size. Thus the requirement that the vessels be 'built in Louisiana' may have to be disregarded by the courts here also." (XXXV Tulane L. Rev. at pp. 194, 195 and 198)

It is clear that the Louisiana Collector, and the Louisiana Supreme Court, feel that Louisiana ought to be free to discriminate at will in favor of intra-state Louisiana businessmen, and against those who operate their businesses across state lines, in interstate commerce.<sup>1</sup>

We submit that this Court should take this opportunity to make it clear to Louisiana, and other states, that state taxation may not be designed and enforced so as to give a direct commercial advantage to local business.

<sup>1</sup> The proposition that Louisiana demands the use tax upon vessels "made outside Louisiana," while exempting from the sales tax vessels "made in Louisiana," is not hypothetical. See Brief filed in support of the Jurisdictional Statement, by Thomas Jordan, Inc., *Amicus Curiae*.

## The Collector's Motion to Dismiss This Appeal—

### FIRST: "Separate, But Almost Equal"

The Louisiana Collector of Revenue argues:

"Louisiana has accomplished an **almost perfect equalization** of the 2% tax burden. . . ."<sup>1</sup>

Like the Louisiana Supreme Court, he contends that the burden upon interstate commerce is "purely incidental."<sup>2</sup> The Collector thus concedes that there is some discrimination against the interstate operator, but he argues that there is ". . . **almost perfect** . . ." equality of treatment, and — in effect—that the "incidental" discrimination is *de minimis*.

We respectfully submit that the Collector is in error. The issue here is very substantial, not only in the number of dollars involved, but in the number of taxpayers concerned.

Within the scant thirty days from the filing of the Jurisdictional Statement, the following taxpayers filed briefs *amicus curiae*, urging this Court to note jurisdiction and to determine this issue against the Louisiana Collector:

1. Humble Oil and Refining Company
2. Chicago Bridge and Iron Company
3. Sperry Rand Corporation (Remington Rand Division)
4. Thomas Jordan, Inc.
5. American Can Company

<sup>1</sup> Motion to Dismiss, p. 9.

<sup>2</sup> Motion to Dismiss, p. 12.



6. Rosson-Richards Processing Company

7. Wate-Kote Co., Ltd.

The sums of money involved for seven of the eight taxpayers who have appeared herein are:

1. Halliburton Oil Well Cementing Company .....	\$ 40,642.65
2. Humble Oil and Refining Company....	18,659.95 <sup>1</sup>
3. Chicago Bridge and Iron Company....	82,226.41 <sup>2</sup>
4. Sperry Rand Corporation .....	4,710.93 <sup>3</sup>
5. Thomas Jordan, Inc. ....	49,999.24 <sup>4</sup>
6. American Can Company.....	(amount not stated)
7. Rosson Richards Processing Co. ....	24,126.90 <sup>5</sup>
8. Wate-Kote Co., Ltd. ....	6,746.90 <sup>6</sup>
<hr/>	
Total (for the tax years now at issue) .....	\$227,112.98

And, as Chicago Bridge and Iron put it, "such taxes continue to accrue . . ." from year to year.

<sup>1</sup> Humble's Brief *Amicus Curiae*, p. 3. Note that this \$18,659.95 is actually included in Chicago Bridge and Iron's \$82,226.41. *Ibidem*, fn. 1.

<sup>2</sup> Chicago Bridge's Brief *Amicus Curiae*, p. 3.

<sup>3</sup> Speery Rand's Brief *Amicus Curiae*, p. 3.

<sup>4</sup> Thomas Jordan's Brief *Amicus Curiae*, p. 2.

<sup>5</sup> Joint Brief filed, *Amicus Curiae*, on behalf of Rosson Richards Processing Company and Wate-Kote Co., Ltd., p. 3.

<sup>6</sup> Brief, *Amicus Curiae*, at p. 4. Note that the tax years actually at issue for Halliburton are 1952 through 1955. The tax for subsequent years awaits the determination of this case.



Of course, the chorus of protest in these *amicus curiae* briefs is only from a representative cross-section of the hundreds of taxpayers who engage in interstate activities reaching into Louisiana and who, therefore—as this Court may judicially notice—are directly affected by the ruling of the Louisiana Supreme Court—which authorizes heavier taxation upon interstate operators, and lighter taxation upon their purely intrastate competitors.

As this Court may judicially observe—and as the Collector will readily concede—many millions of dollars of taxpayers' money hang upon the final determination of this case.

The Collector frankly contends that Louisiana may erect a multi-million-dollar tax barrier at the state border lines, thus openly impeding the flow of interstate commerce. And he argues that he may do this, because the impediment is created by discrimination which is only "incidental." He argues that there is "... **almost** perfect equality of treatment," and that this is enough to satisfy the federal constitution.

It is respectfully submitted that the Collector's "**Almost-Equal**" argument is specious, and—further—that it is without foundation in fact.

## **SECOND: The Collector Would Compare the Incomparable.**

The Louisiana Supreme Court, adopting the Collector's arguments stated:

"The proper comparison would be between the use tax on the assembled equipment and a sales tax on the same equipment **IF** it were sold. . . ."<sup>1</sup>

<sup>1</sup> R. 47.

The Collector develops this misleading comparison at p. 9 of his Motion to Dismiss, viz.,

"The 2% sales tax and the 2% use tax if applied consistently as the Collector has applied it in this case, will assure that prior to the first use or consumption of any and all tangible property in the state, **such property shall bear a 2% tax burden**, either by virtue of its first sale at retail or by virtue of its first use in the State of Louisiana."

"Thus, every person in the state who first uses or consumes tangible personal property is placed on an equal economic basis with every other person using or consuming similar property."

We adopt the following clear discussion from the brief, *amicus curiae*, filed by the Chicago Bridge and Iron Company:

"... the **comparison suggested by the court is wholly improper**. The assembled equipment was, in fact **not** sold by Halliburton. The absence of discrimination against Halliburton vis-a-vis local competitors who **sell** assembled equipment is immaterial. The damaging discrimination exists with respect to local competitors who, like Halliburton, do **not** sell, but who, unlike Halliburton, fabricate in Louisiana. **The cases that uphold non-discriminatory taxation of interstate commerce do not determine the presence or absence of discrimination by comparing the treatment of wholly unlike transactions.** On the contrary, their plain teaching is that the determination must be made by comparing the taxation of an interstate transaction with the taxation of an identical transaction carried out entirely within the taxing state. If a State wishes to tax 'the stranger from afar' in respect of what he does outside the state, it must collect no greater toll from him

than it collects from one of its own citizens **who does the same things** within its borders. This standard of equality Louisiana has stipulated that it does not meet."<sup>1</sup> (Emphasis supplied.)

The Louisiana Collector has stipulated that Halliburton (or a competitor of Halliburton in exactly the same line of endeavor) would pay no sales or use tax on the labor-and-shop-overhead if it set up its fabrication shops in Louisiana. Indeed, in his Motion to Dismiss, the Collector-affirmatively argues that a taxpayer in Halliburton's position could "... reduce his tax burden by manufacturing [his] equipment in Louisiana for his own use."<sup>2</sup>

The Collector ignores (and would have the Court ignore) the fact that Halliburton is a **manufacturer, which uses its own work product**. Halliburton is a "manufacturer-user," sometimes called a producer-consumer. The fairness, and legality, of Halliburton's tax burden cannot be determined by comparing its economic activity with that of an intra-state seller or **purchaser-at-retail**.

This is the Collector's basic fallacy. He would argue that the tax burdens are equal (upon the Louisiana residents and the out-of-state persons) because the sales tax, paid by a **purchaser-at-retail** in Louisiana, includes labor and overhead.

With respect, this is an effort to compare the incomparable. The price paid by a purchaser at retail (upon which a sales tax is paid) includes three elements (a) the cost of the

<sup>1</sup> Chicago Bridge and Iron Company. Brief *Amicus Curiae*, at pp. 5-6.

<sup>2</sup> Motion to Dismiss, at p. 10.

physical parts incorporated in the finished product, (b) the labor and overhead element, and (c) the profit.

It is perfectly proper to compare the sales tax upon a sale-at-retail in Louisiana, with a use tax levied upon property purchased from a retail dealer outside the state, and then brought into Louisiana. In this case the two economic transactions are the same (purchase at retail in each case). And, in such situation the Collector makes no effort to increase the tax base by reason of the interstate movement.

But this is not what the Collector contends for here. He would compare the economic activity (the business endeavor) of an out-of-state "manufacturer-user" (Halliburton) with that of an intra-state purchaser-at-retail.

And this is the specious element in the Collector's argument. One cannot fairly compare optical lenses with fried eggs, nor compare peaches with new-born-chicks. To test for discrimination, one must compare the comparable.

We submit that the only fair comparison would be to compare the tax burden of an out-of-state manufacturer-user, with the tax burden of an intra-state manufacturer-user. In other words, if Halliburton had in Louisiana a direct competitor, in exactly the same operation, would the tax burden of each be the same?

Obviously, the Collector would demand the 2% use tax solely from Halliburton, the out-of-state operator, and he would exempt the intra-state operator. We submit that the Collector's position is discriminatory and illegal; that his position is unsound.

**THIRD: The Collector Argues that "... the property has not already borne a similar tax ..." in Any Other State.**

At pages 2, 3 and 9 of the Motion to Dismiss, the Collector makes this argument without articulating any conclusion therefrom. For example, at p. 3 the statement, *in toto*, is

"None of the property has ever been subjected in any other state to a similar tax."

In some obscure way, the Collector seeks freedom to discriminate here because this equipment was not taxed under the Oklahoma Sales Tax.<sup>1</sup>

This argument is wholly fallacious. If the Oklahoma Sales Tax law had been applicable, then the sales tax that would have been paid to Oklahoma would have been a 2% tax on the cost of the tangible physical components which were built into the finished equipment. Of course, there would have been no Oklahoma sales tax on the labor-and-shop-overhead element of cost. Thus, when the mobile truck-borne equipment was put in motion and driven up to the Louisiana state line, it would have already borne a 2% tax upon its tangible physical parts, but no tax would have been paid upon the labor-and-shop-overhead element of its cost. This is exactly the same situation as that which now exists. A 2% tax has been paid to Louisiana, upon all of the value of this equipment, except the labor-and-shop-overhead element. Louisiana is demanding a 2% tax on the labor-and-shop-overhead cost of this imported equipment, although, admittedly, it would not have taxed this element of cost in equipment fabricated in Louisiana. Similarly, if Oklahoma had collected a 2% sales tax,

<sup>1</sup> The components of this equipment were exempt from the Oklahoma Sales Tax because the production was for export.

Louisiana would credit the taxpayer with the tax paid to Oklahoma (the tax on the tangible equipment) but would still demand the tax on labor-and-shop-overhead. The Louisiana statute specifically provides that "If the tax<sup>1</sup> paid in another state is not equal to . . . the amount of tax imposed by this chapter . . .," the importing user must pay the difference. (La. R.S. 47.305. *Infra*, p. 82.)

Therefore, it is clear beyond dispute that, if Oklahoma had collected a Sales tax on the components, Louisiana's position would be unchanged. Louisiana would still demand 2% of the labor-and-shop-overhead, while, exempting this item of cost where such fabrication occurred entirely within Louisiana's borders. *Ergo*—Discrimination against interstate commerce.

Whatever point the Collector intended to make here, it is without merit.

#### **FOURTH: A Problem of "Management." Save Louisiana Taxes by Manufacturing in Louisiana.**

The Collector argues that for Halliburton, this is

" . . . not an interstate commerce problem but a problem of management in locating and so arranging its operations in such manner as to reduce its cost of operations to a minimum."<sup>1</sup>

And, he concedes that, if he is sustained here,

" taxpayer may reduce his tax burden by manufacturing equipment within Louisiana for his own use."<sup>2</sup>

The Collector thus admits that the tax burden upon the out-of-state taxpayer (the multi-state operator) is not equal

<sup>1</sup> Motion to Dismiss, p. 13.

<sup>2</sup> *Ibid.*, p. 10.

to, but is heavier than the burden upon the purely intra-state taxpayer. Yet, again and again he gives lip-service to the "fundamental purpose of equality of the Louisiana Use Tax."<sup>1</sup>

The Collector's argument is incredible. He contends that Louisiana's position is non-discriminatory. Simultaneously he argues that, by good corporate "management," Halliburton could avoid this Louisiana tax by ceasing its interstate movement, and becoming a purely intra-state operator, having its entire operation within Louisiana's borders! !

We respectfully submit that this is a case of gross avowed discrimination against interstate commerce contrary to the federal constitution.

## CONCLUSION

Appellant taxpayer's position is simply this:

- I. The Use Tax falls upon the use of goods imported across state lines, i.e., upon transactions in interstate commerce.
- II. The Use Tax has been upheld, as constitutional, and as **not** a discriminatory burden upon interstate commerce, **SOLELY BECAUSE** (in the case then at issue) it **did not exceed the sales tax**, but was merely complementary to the sales tax and precisely equal to the sales tax, and—therefore—the use tax did not "discriminate" against the interstate transaction. *Henneford v. Silas Mason Company*, 300 U.S. 577, 81 L. Ed. 814, 57 S. Ct. 524.

<sup>1</sup> Motion to Dismiss, p. 11.



III. Therefore, whenever the use tax (falling solely on interstate transactions) is more onerous than the sales tax (falling on comparable intrastate transactions) then the use tax loses the fiat of the *Henneford* decision, and is unconstitutional because it does discriminate against the transactions which are in interstate commerce.

The taxpayer, Halliburton, contends that, in any case where the burden of the use tax is more onerous than the sales tax (on the comparable intrastate transaction) would be, then the use tax—as so applied—is not supported by the *Henneford* decision, and the use tax statute is violative of the federal constitution.

If, "... the stranger from afar ..." is to bear a burden no heavier than that of "... the resident of Louisiana ..." (as the Collector concedes, and even argues), then the only comparison that can be made is to compare the burden which falls upon the taxpayers in the two cases, by asking three simple questions:

1. What is the tax burden upon the out-of-state taxpayer, the "stranger from afar"?
2. What is the tax burden upon the intra-state taxpayer, the Louisiana resident?
3. Are these two tax burdens equal?

The Collector has stipulated that Halliburton (or a competitor of Halliburton in the same line of endeavor) would pay no sales or use tax if it set up its shops, and operated, in Louisiana. Yet the Collector demands a 2% use tax from Hal-

liburton. How can the Collector seriously argue that this is equality of treatment? The answer is that he cannot.

Can the "compensating" use tax of a state, in any case, reach further or be more burdensome than the sales tax of that state, to which latter tax the Use Tax is supposed to be complementary? Can the burden of the Use Tax (falling upon an out-of-state "manufacturer-user") be heavier than the burden of the sales tax which would fall upon the comparable (and competing) intra-state "manufacturer-user"?

Suppose, in a given state, that the two-per-cent Sales Tax (which falls upon intra-state sales) were totally repealed, but that the two-per-cent Use Tax were retained, in such manner that it fell only upon the use of goods purchased outside the state and then imported across state lines. Would the Use Tax, in such a case be constitutional? We respectfully submit that it would not. The Use Tax (upon use of imported goods) was upheld by the United States Supreme Court in the *Henneford* case, *supra*, because (and only "because") it was a compensatory and complementary tax, coextensive and coterminous, with the Sales Tax of the same state. If the Sales Tax were totally repealed, then there would be no support for the Use Tax (solely levied on imported goods). The *Henneford* doctrine would not apply. The Use Tax (upon use of imported goods) could not stand alone, in the absence of a similar and coextensive Sales Tax upon the comparable intra-state situation.

Suppose, again, that the Sales Tax were partially repealed. Suppose, for example, that the Louisiana Sales Tax statute was amended to exclude the sale of automobiles in Louisiana. And suppose, at the same time, that the law continued to levy

a two-per-cent Use Tax, solely upon the use in Louisiana of automobiles purchased outside of the state, and then brought into the state, across the state line. Is it not obvious that this would discriminate, to the extent of the 2% tax, against interstate transactions, in favor of the comparable intra-state transactions? Is this not the type of "discrimination" which is forbidden by the Commerce Clause and by the Due Process Clause of the United States Constitution? Can a contrary argument be seriously advanced?

Suppose the Use Tax were increased to 3%, and the (intra-state) Sales Tax kept at 2%, would not this be unconstitutional discrimination?

Does it not follow, that in any and every case whatsoever (and particularly in the present case) where the burden of the Use Tax extends beyond that of the Sales Tax and where the Use Tax falls more heavily upon the interstate situation than the Sales Tax would fall upon the comparable intrastate situation, then the Use Tax, as so applied, is unconstitutional and void, as violative of the Federal Constitution.

Where the Sales Tax ends, the Use Tax must end.

As the Supreme Court of Alabama<sup>2</sup> said:

"(45) The United States Supreme Court has held that a use tax, integrated with a sales tax, in a manner similar to ours, is not violative of the Commerce Clause when such system of taxation does not discriminate against transactions in interstate commerce, but merely equalizes the burden of taxation on purchases made in interstate commerce and on strictly local sales. . . . [citations] However, if such a system of taxation places a discrimini-

<sup>1</sup> Or, increased to 50%? Or, 100%?

<sup>2</sup> *State v. Bay Towing and Dredging Co., Inc.*, 265 Ala. 285, 90 So. 2d 743 (1956).

natory burden on transactions in interstate commerce, which would not apply to local sales, the use tax would become unconstitutional in its operation. . . [citations] As said in *Best & Co. v. Maxwell*, supra (311 U.S. 454, 61 S. Ct. 335):

"The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce: \* \* \*"

If the interstate **Use Tax** can exceed the intrastate **Sales Tax**, where is the line to be drawn? Could the Use Tax be fixed at 50% and the Sales Tax at 2%, thus creating a tax wall around the state?

In the present case the **Louisiana Collector** has stipulated that he would discriminate, and would tax only the "stranger from afar," while exempting Louisiana operators. We submit that the Federal Constitution forbids this.

It is submitted that the position of the taxpayer, Halliburton, is completely sound; that all existing authority supports its position; that no authority to the contrary exists anywhere; that the Constitution of the United States strikes down the position of the Louisiana Collector, which is arbitrary and capricious, and violative of the commerce clause of the federal constitution and of the Fourteenth Amendment.

Appellant earnestly submits that this Court, having noted probable jurisdiction, should rule that the Constitution of the United States forbids the "**forthright** discrimination" which the Louisiana Collector would practice in this case.

Since the use tax moneys held in escrow, by the Louisiana Collector, are demanded and held solely because Halliburton engaged in interstate commerce, and since the levy and collection of said use tax moneys were a discrimination against interstate commerce, appellant submits that the judgment of the Louisiana Supreme Court should be reversed, and the judgment of the trial court affirmed, thus awarding to appellant judgment in the sum of Forty-three thousand, three Hundred twenty-five and 63/100 (\$43,325.63) Dollars, with interest at the rate of 2% per annum from December 13, 1956 until payment is made.<sup>1</sup>

The Court is respectfully referred to the Summary of Argument<sup>2</sup> for a resume of appellant's contentions.

Respectfully submitted,

C. VERNON PORTER  
BENJAMIN BROWN TAYLOR, JR.  
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Baton Rouge, Louisiana

November 19, 1961

<sup>1</sup> See Judgment of the Trial Court (R. 31) and Opinion of the Louisiana Supreme Court (R. 50). Note that the trial judge awarded \$43,325.63. The Supreme Court of Louisiana reduced this to the sum of \$2,682.98 which was the amount dependent upon the uncontested Third Phase of this case. The difference, or \$40,642.65, plus interest, is at issue here.

<sup>2</sup> *Supra*, p. 27.

## PROOF OF SERVICE

I, Benjamin Brown Taylor, Jr., one of the attorneys for Halliburton Oil Well Cementing Company, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of December, 1961, I served a copy of the foregoing *Brief for the Appellant*, upon the following named persons, by mailing—postage prepaid—a copy thereof to each of them at their offices at the respective addresses set out opposite the name of each, viz.,

- (1) Roland Cocreham, Collector of Revenue, Appellee  
 % Chapman Sanford, Attorney of Record, and  
 John B. Smullin, Attorney of Record  
 Capitol Annex Building  
 Baton Rouge, Louisiana
- (2) Humble Oil and Refining Company, *Amicus Curiae*  
 % Forest M. Darrough, Attorney of Record  
 1216 Main Street  
 Houston, Texas
- (3) Chicago Bridge and Iron Company, *Amicus Curiae*  
 % Albert L. Hopkins, Attorney of Record  
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 One North LaSalle Street  
 Chicago 2, Illinois
- (4) Sperry Rand Corporation, *Amicus Curiae*  
 % Cicero C. Sessions, Attorney of Record  
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- (5) Thomas Jordan, Inc., *Amicus Curiae*  
% Charles D. Marshall, Attorney of Record  
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- (6) American Can Company, *Amicus Curiae*  
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Company, *Appellant*

Baton Rouge, Louisiana  
December 1, 1961



**APPENDIX "A"****Pertinent Provisions of  
The Louisiana Sales Tax Law<sup>1</sup>**

**Chapter 2<sup>o</sup> of Subtitle II of Title 47,  
Louisiana Revised Statutes of 1950, as Amended**

**LOUISIANA SALES TAX LAW**

Sec.

- 301. Definitions.
- 302. Imposition of tax.
- 303. Collection from dealer.
- 304. Treatment of tax by dealer.
- 305. Exclusions and exemptions from tax.
  - 305.1 Exclusions and exemptions; ships and ships' supplies.
  - 305.3 Exclusions and exemptions; seeds.
- 306. Returns and payment of tax.
  - 306.1 Returns and payment of tax; for hire carriers.
- 307. Collector's authority to determine the tax in certain cases.

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<sup>1</sup>Generally known as the *Sales and Use Tax Law*.

This statute is reproduced in full, as Appendix "B" to Appellant's Jurisdictional Statement, at p. 69.

- 308. Termination or transfer of business.
- 309. Dealers required to keep records.
- 310. Wholesalers and jobbers required to keep records.
- 311. Collector's authority to examine records of transportation companies.
- 312. Failure to pay tax on imported tangible personal property; grounds for attachment.
- 313. System of import permits; seizure and forfeiture for vehicles used in importing without permit.
- 314. Failure to pay tax; rules to cease business.
- 315. Sales returned to dealer; credit or refund of tax.
- 316. Collector to provide forms.
- 317. Cost of administration.
- 318. Disposition of collections.

### **§ 301. Definitions**

As used in this Chapter, the following words, terms and phrases have the meaning ascribed to them in this Section, except when the context clearly indicates a different meaning.

(1) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect. The

term "business" shall not be construed to include the occasional and isolated sales by a person who does not hold himself out as engaged in business.

(2) "Collector" means the Collector of Revenue for the State of Louisiana and includes his duly authorized assistants.

(3) "Cost price" means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever.

(4) "Dealer" includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution or for storage to be used or consumed in this state.

"Dealer" is further defined to mean;

(a) every person who imports, or causes to be imported, tangible personal property from any state or foreign country for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state;

(b) every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein;

(c) any person who has sold at retail, or used, or consumed or distributed, or stored for use or consumption in

this state, tangible personal property and who cannot prove that the tax levied in this Chapter has been paid on the sale at retail, the use, the consumption, the distribution or the storage of said tangible personal property;

(d) any person who leases or rents tangible personal property for a consideration, permitting the use or possession of the said property without transferring title thereto;

(e) any person who is the lessee or rentee of tangible personal property and who pays to the owner of such property a consideration for the use or possession of such property without acquiring title thereto;

(f) any person who sells or furnishes any of the services subject to tax under this Chapter;

(g) any person, as used in this act, who purchases or receives any of the services subject to tax under this Chapter;

(h) any person engaging in business in this state. "Engaging in business in this state" means and includes any of the following methods of transacting business: maintaining directly, indirectly, or through a subsidiary, an office, distribution house, sales house, warehouse or other place of business or by having an agent, salesman or solicitor operating within the state under the authority of the seller of its subsidiary irrespective of whether such place of business, agent, salesman or solicitor is located in this state permanently or temporarily or whether such seller or subsidiary is qualified to do business in this state.

(9) "Purchaser" means and includes any person who acquires or receives any tangible personal property, or the privilege of using any tangible personal property, or receives any services pursuant to a transaction subject to tax under this Chapter.

(10) "Retail sale" or "sale at retail," means a sale to a consumer or to any person for any person other than for resale in the form of tangible personal property, and shall mean and include all such transactions as the collector, upon investigations, finds to be in lieu of sales; provided that sales for resale must be made in strict compliance with the rules and regulations. Any dealer making a sale for resale, which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax.

The term "sale at retail" does not include sales of materials for further processing into articles of tangible personal property for sale at retail, nor does it include an isolated or occasional sale of tangible personal property by a person not engaged in such business.

(11) "Retailer" means and includes every person engaged in the business of making sales at retail or for distribution, or use or consumption, or storage to be used or consumed in this state.

(12) "Sale" means any transfer of title or possession, or both, exchange, barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property, for a consideration, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrica-

tion work, and the furnishing, preparing or serving, for a consideration, of any tangible personal property, consumed on the premises of the person furnishing, preparing or serving such tangible personal property. A transaction whereby the possession of property is transferred but the seller retains title as security for the payment of the price shall be deemed a sale.

(13) "Sales price" means the total amount for which tangible personal property is sold, including any services, except services for financing, that are a part of the sale valued in money, whether paid in money or otherwise, and includes the cost of materials used, labor or service costs, except costs for financing which shall not exceed the legal interest rate and a service charge not to exceed 6 percent of the amount financed, and losses; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold.

(Source: Aet 143—1954)

(15) "Storage" means and includes any keeping or retention in this state of tangible personal property for use or consumption in this state or for any purpose other than for sale at retail in the regular course of business.

(16) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, felt or touched, or is in any other manner perceptible to

the senses. The term "tangible personal property" shall not include stocks, bonds, notes, or other obligations or securities.

(18) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business.

(19) "Use-tax" includes the use, the consumption, the distribution and the storage, as herein defined.

(Source: Acts 1948, No. 9, § 6.)

### **§ 302. Imposition of tax**

A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

The tax levied in this Section shall be collected from the



dealer, as defined herein, shall be paid at the time and in the manner hereinafter provided, and shall be, in addition to all other taxes, whether levied in the form of excise, license, or privilege taxes, and shall be in addition to taxes levied under the provisions of Chapter 3 of Subtitle II of this Title.

(Source: Acts 1948, No. 9, § 2.)

### § 303. Collection from dealer

The tax imposed under R.S. 47:302 shall be collectible from all persons, as hereinafter defined, engaged as dealers, as hereinafter defined.

On all tangible personal property imported, or caused to be imported, from other states or foreign country, and used by him, the "dealer," as hereinafter defined, shall pay the tax imposed by this Chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this Chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

(Source: Acts 1948, No. 9, § 3.)

### § 305. Exclusions and exemptions from the tax

It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this

Chapter to levy a tax on the sale at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

The provisions of this Chapter shall not apply in respect to the use, or consumption, or distribution, or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to, or greater than, the amount imposed by this Chapter has been paid in another state, the proof of the payment of such tax to be according to rules and regulations made by the collector of revenue. If the amount of tax paid in another state is not equal to, or greater than, the amount of tax imposed by this Chapter, then the dealer shall pay to the collector of revenue an amount sufficient to make the tax paid in the other state and in this state equal to the amount imposed by this Chapter.

. . .

**§ 305.1 Exclusions and exemptions; ships and ships' supplies**

A. The tax imposed by R.S. 47:302 (A) (1) shall not apply to sales of materials, equipment and machinery which enter into and become component parts of ships, vessels, including commercial fishing vessels, or barges, of fifty tons load displacement and over, built in Louisiana, nor to the gross proceeds from the sale of such ships, vessels, or barges when sold by the builder thereof.

B. The taxes imposed by R.S. 47:302 shall not apply to materials and supplies purchased by the owners or operators of ships or vessels operating exclusively in foreign or interstate coastwise commerce, where such materials and supplies

are loaded upon the ship or vessel for use or consumption in the maintenance and operation thereof; nor to repair services performed upon ships or vessels operating exclusively in foreign or interstate coastwise commerce; nor to the materials and supplies used in such repairs where such materials and supplies enter into and become a component part of such ships or vessels; nor to laundry services performed for the owners or operators of such ships or vessels operating exclusively in foreign or interstate coastwise commerce, where the laundered articles are to be used in the course of the operation of such ships or vessels.

C. The provisions of this section do not apply to drilling equipment used for oil exploitation or production unless such equipment is built for exclusive use outside the boundaries of the state and is removed forthwith from the state upon completion.

## APPENDIX "B"

[200-114] Letter from Legal Division, Department of Revenue, July 13, 1956. [Re **Intrastate Production**]<sup>1</sup>

Sales and use tax—Use tax liability.—When supply items are purchased at retail in Louisiana and are manufactured, fabricated and assembled in Louisiana into a finished product for use solely by the purchaser and are not held or offered for resale, use tax would not be applicable to the finished items. The purchaser should pay the sales tax on the sales price of the supply items when purchased.

When supply items are purchased at retail outside the state and brought into Louisiana where they are manufac-

<sup>1</sup> See p. 15, *infra*, for discussion.

tured, fabricated and assembled into a finished product for use solely by the purchaser and not held or offered for resale the use tax is not applicable to the finished items. The purchaser should pay the use tax on the cost price of the supply items when they are brought into the state.

See ¶ 60-101a.

*[Questions submitted by CCH]*

We should appreciate being advised whether the use tax applies in the following two situations:

1. Where supply items are purchased at retail in Louisiana and are manufactured, fabricated and assembled in Louisiana into a finished product for use solely by the purchaser and are not held or offered for resale;
2. Where supply items are purchased at retail outside Louisiana and are brought into Louisiana where they are manufactured, fabricated and assembled into a finished product for use solely by the purchaser and are not held or offered for resale.

If the use tax does apply to such finished items, are direct labor and overhead charges deductible in arriving at the cost basis of the items?

*[Answer]*

Please be advised that use taxes are not applicable to finished items in either of the situations outlined by you. In the first situation the purchaser should pay sales tax on the sales price of the supply items when purchased. In the second situation the purchaser should pay use tax on the cost price of the supply items when they are brought into this state.

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1961

**HALLIBURTON OIL WELL CEMENTING COMPANY,**  
*Appellant,*

**JAMES S. REILY, COLLECTOR OF REVENUE,  
STATE OF LOUISIANA (SINCE SUCCEEDED BY  
ROBERT L. ROLAND, WHO WAS DULY SUCCEEDED  
BY ROLAND COCREHAM),**

*Appellee.*

**On Appeal From The Supreme Court of the  
State of Louisiana**

**BRIEF OF THE APPELLEE**

**CHAPMAN L. SANFORD**  
Attorney of Record upon whom  
service may be made.  
Room 403  
Capitol Annex Bldg.  
Baton Rouge, Louisiana

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1961

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HALLIBURTON OIL WELL CEMENTING COMPANY,  
*Appellant,*

*v.*

JAMES S. REILY, COLLECTOR OF REVENUE,  
STATE OF LOUISIANA (SINCE SUCCEEDED BY  
ROBERT L. ROLAND, WHO WAS DULY SUCCEEDED  
BY ROLAND COCREHAM),

*Appellee.*

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**On Appeal From The Supreme Court of the  
State of Louisiana**

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**BRIEF OF THE APPELLEE**

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*May It Please The Court:*

**QUESTIONS PRESENTED**

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The law applicable to this case is well settled.  
The question presented is not one of law but one of fact.

The proper questions for consideration by the  
Court are:

1. Does the Louisiana Use Tax discriminate  
against interstate commerce?

2. Does the Louisiana Use Tax impose a greater  
burden upon non-residents than upon Louisiana resi-  
dents?

We concede that the State of Louisiana may not discriminate against interstate commerce.

We concede that the State of Louisiana may not impose taxes designed to favor its own residents and to tax more heavily nonresidents.

### THE FACTS

The facts of this case have been stipulated by the parties.<sup>1</sup>

Appellant, Halliburton Oil Well Cementing Company, (hereinafter referred to as Halliburton) is engaged in the business of servicing oil wells throughout the oil producing states of the United States, including Louisiana. Its principal place of business is maintained in Duncan, Oklahoma, and there it manufactures, assembles, and builds specialized oil well service units which it employs in its oil well service operations.

Halliburton procures from various vendors throughout the United States raw materials, semi-finished, and finished articles necessary for the manufacture, assembly, and construction of well service units. When a well service unit has been completed at Duncan, Oklahoma and has been tested for operation, it is assigned to one of Halliburton's various field camps in the United States, where it obtains a permanent situs unless transferred to another field camp location where greater use may be made of it. A certain number of these units came to rest in Louisiana

<sup>1</sup>The stipulation is contained in transcript of record pp.

and obtained a permanent situs therein servicing oil wells located in Louisiana. Halliburton's books are kept in Oklahoma; they reflect the cost value of the units as comprising material cost, labor cost, and shop overhead.

In addition to the above units, Halliburton keeps in Louisiana certain cementing service units it purchased from the Spartan Tool and Service Company of Houston, Texas when that company determined that it should no longer continue in the business of servicing oil wells, and an airplane purchased from the Western Newspaper Union of New York, which companies are not regularly engaged in the business of selling cementing units or airplanes.

For the years 1952, 1953, 1954, and 1955, Halliburton regularly filed with the State of Louisiana tax returns showing the amount of use tax money, as reflected by its calculations, due the State of Louisiana by it on service units employed in the State. Such amounts were paid to the State of Louisiana at the time of filing the statutory use tax returns.

Halliburton used as its cost basis for computing the use tax on equipment manufactured by it only the cost of the component parts used in manufacturing the equipment brought into the State. Halliburton paid no tax whatsoever on the equipment and airplane purchased by it outside the State from persons not ordinarily engaged in the sale of such equipment (casual sale).

There is no evidence that any of the property

in question herein has been the subject of a similar tax in any other state.

The Collector of Revenue of the State of Louisiana (hereinafter referred to as Collector) determined a deficiency in the tax reported by Halliburton and determined that the cost of the completed manufactured equipment as of the time it became a part of the mass of property of the State of Louisiana necessarily was far greater than the price paid by Halliburton for the unassembled parts and material used in the manufacture of the final product of equipment used in the State of Louisiana. The Collector computed the cost of the equipment by aggregating not only the cost of component parts and materials but also the labor and shop overhead attributable to the particular piece of equipment. There is no dispute as to the accuracy of such computation.

The Collector also included in the determination of the deficiency the cost of the airplane and equipment brought into Louisiana which was purchased outside the State at casual sales by persons not ordinarily engaged in the business of selling such property.

Halliburton paid the deficiency under protest and sued for recovery under the appropriate Louisiana Statute.

Halliburton alleged that the use tax, if interpreted and applied as the Collector would interpret and apply it to Halliburton, would cast upon the taxpayer a burden more onerous than that which would be levied by the Louisiana Sales and Use Tax had the

transactions involved occurred in Louisiana; and, that a state Use Tax may be upheld as reasonable, legal and constitutional, only insofar as the burden thereof is equal to and not in excess of the burden of the Sales Tax of that same state, to which Sales Tax said Use Tax is complementary. Plaintiff further alleged that the tax demanded of it infringed upon the right of regulation of interstate commerce by Congress (Article I, Section 8, Clause 3, Constitution of the United States), in that it was an attempt by the State of Louisiana to lay a tax on the privilege of engaging in interstate commerce and upon the carrying on of the business of interstate commerce. It still further, alleged that it would be deprived of its property without due process of law, contrary to the protection and guaranty granted under the Constitution of the United States and particularly under the Fourteenth Amendment thereof and under Article I, Section 2, of the Constitution of the State of Louisiana, should it be required to pay the tax assessed.

The trial court agreed with Halliburton and rendered judgment in its favor. On appeal by the Collector, the Louisiana Supreme Court found that the use tax is imposed after commerce is at an end; it applies equally to all property as of the moment of taxation; and all taxpayers in similar position are equally treated. The Louisiana Supreme Court reversed the trial court and rendered judgment in favor of the Collector.<sup>2</sup>

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<sup>2</sup>The opinion of the Supreme Court of Louisiana is reported at 241 La. 67, 127 So.2d 502, and is reproduced in transcript of record pp. 34-50.

## The Louisiana Taxing Statute

The provisions of the Louisiana sales and use tax statute are contained in Louisiana Revised Statutes, Title 47, Sections 301 through 318. The pertinent provisions read as follows:

### LSA-R.S. 47:302:

"A. There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

"(1) At the rate of two per centum (2%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

"(2) At the rate of two per centum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

\* \* \* \* \*

"C. \* \* \*

"The tax levied in this Section shall be collected from the dealer, as defined herein, shall be paid at the time and in the manner hereinafter provided, and shall be, in addition to all other taxes, whether levied in the form of excise,



license, or privilege taxes, and shall be in addition to taxes levied under the provisions of Chapter 3 of Sub-title II of this Title."

LSA-R.S. 47:301 (13) (As Amended):

"(13) 'Sales price' means the total amount for which tangible personal property is sold, including any services, except services for financing, that are a part of the sale valued in money, whether paid in money or otherwise, and includes the cost of materials used, labor or service costs, except costs for financing which shall not exceed the legal interest rate and a service charge not to exceed 6% of the amount financed, and losses; provided that cash discounts allowed and taken on sales shall not be included, nor shall the sales price include the amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold."

LSA-R.S. 47:301 (10)

"(10) 'Retail sale,' or 'sale at retail,' means a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property, and shall mean and include all such transactions as the collector, upon investigation, finds to be in lieu of sales; provided that sales for resale must be made in strict compliance with the rules and regulations. Any dealer making a sale for resale, which is not in strict compliance with the rules and regulations, shall himself be liable for and pay the tax."

LSA-R.S. 47:301 (3):

"(3) 'Cost price' means the actual cost of the articles of tangible personal property with-



out any deductions therefrom on account of the cost of materials used, labor or service cost, transportation charges or any other expenses whatsoever."

LSA-R.S. 47:301 (18):

"(18) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business."

LSA-R.S. 47:301 (4):

"(4) 'Dealer' includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution or for storage to be used or consumed in this state.

"'Dealer' is further defined to mean:

"(a) every person, who imports, or causes to be imported, tangible personal property from any offers for sale at retail, or who has in his possession or consumption, or distribution, or for storage to be used or consumed in this state;

"(b) every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in this state, tangible personal property as defined herein;

"(c) any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax

levied by this Chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of said tangible personal property;

LSA-R.S. 47:303:

"The tax imposed under R.S. 47:302 shall be collectible from all persons, as hereinafter defined, engaged as dealers, as hereinafter defined.

"On all tangible personal property imported, or caused to be imported, from other states or foreign country, and used by him, the 'dealer', as hereinafter defined, shall pay the tax imposed by this Chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this Chapter, the use, or consumption, or distribution, or storage to be used or consumed, in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event."

LSA-R.S. 47:305:

"It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this state, or produced or manufactured in this state, for export; nor is it the intention of this Chapter to levy a tax on bona fide interstate commerce. It is, however, the intention of this Chapter to levy a tax on the sale

at retail, the use, the consumption, the distribution, and the storage to be used or consumed in this state, of tangible personal property after it has come to rest in this state and has become a part of the mass of property in this state.

"The provisions of this Chapter shall not apply in respect to the use, or consumption, or distribution, or storage of tangible personal property for use or consumption in this state, upon which a like tax equal to, or greater than, the amount imposed by this Chapter has been paid in another state, the proof of the payment of such tax to be according to rules and regulations made by the collector of revenue. If the amount of tax paid in another state is not equal to, or greater than, the amount of tax imposed by this Chapter, then the dealer shall pay to the collector of revenue an amount sufficient to make the tax paid in the other state equal to the amount imposed by this Chapter.

"The 'use tax' under this Chapter shall not apply to tangible personal property owned or acquired in this state, or imported into this state, or held or stored in this state, prior to June 7, 1948; but the 'use tax' will apply to all tangible personal property imported or caused to be imported into this state or after that date, unless the property has previously borne a sales or use tax in another state, equal or greater than the tax imposed by this Chapter."

### SUMMARY OF ARGUMENT

The Constitutional principles that a state may not discriminate against interstate commerce and that a

state may not place a more onerous tax burden on a nonresident taxpayer than it does upon a resident taxpayer in similar circumstances are well established. Any discussion of jurisprudence establishing those principles seems unnecessary. The State of Louisiana does not quarrel with those established principles. Louisiana does, however, emphatically deny that its sales and use tax law are in contravention of those principles. A brief study of the pertinent provisions of the Louisiana sales and use tax law reveals the legislature purpose to establish perfectly complementary taxes calculated to insure that all tangible personal property coming to rest in Louisiana for use therein is the subject of a 2% excise tax whether the sales tax or the use tax at the first moment that such property is taken by a consumer for use or consumption.

In order to levy any tax a legislature must establish four considerations: (1) It must designate who the *taxpayer* will be; (2) It must establish the time at which the tax will be imposed—the *taxable moment*; (3) It must establish the bases upon which the tax will be computed, i.e., the *measure of the tax*; and, (4) It must establish the *rate* of tax.

The Louisiana Legislature set forth the following considerations in establishing the sales tax:

- (1) It designated the *taxpayer* to be the consumer of tangible personal property.<sup>3</sup>

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<sup>3</sup>La. R.S. 47:304 provides in part: "The tax levied in this Chapter shall be collected by the dealer from the purchaser or consumer."

- (2) It designated the *moment of taxation* to be the sale at retail of a tangible personal property which is in effect the first taking of possession of tangible personal property by the consumer for use or consumption.<sup>4</sup>
- (3) It designated the *measure of the tax* to be the sales price which is the cost to the consumer.<sup>5</sup>
- (4) It designated the *rate of tax* to be 2%.<sup>6</sup>

In levying the use tax as a complementary tax to the sales tax, the Louisiana Legislature designated four considerations which in effect are identical to those of the sales tax:

- (1) It designated the *taxpayer* to be the consumer of tangible personal property.<sup>7</sup>
- (2) It designated the *moment of taxation* to be the first possession by the consumer in the State of Louisiana of tangible personal property for use. Thus, while there is no sale in the use tax situation, the effective *moment of taxation* is the same as that for the sales tax.<sup>8</sup>
- (3) It designated the *measure of the tax* to be the cost to the consumer. The cost was defined to be the retail price that such property

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<sup>4</sup>La. R.S. 47:302 A. (1)

<sup>5</sup>Ibid.

<sup>6</sup>Ibid.

<sup>7</sup>Op. cit. supra, f.n. 3.

<sup>8</sup>La. R.S. 47:301 (18) and 47:303.

would bring if sold at retail at the *taxable moment*.<sup>9</sup>

(4) It designated the *rate* of tax to be 2%.<sup>10</sup>

It is clear, therefore, that the Louisiana Sales Tax and the Louisiana Use Tax are identical. While there is no difference in the four considerations of the tax levy, the two taxable situations arise differently. In the sales tax situation the tangible personal property has already become a part of the mass of the property in the State prior to imposition of the tax, but it has not yet been taken by a consumer for use or consumption. It is merely in the hands of a retailer awaiting the moment of taking by the consumer. In the use tax situation the tangible personal property is brought into the State by the consumer and the four considerations arise immediately after commerce is at an end and the property has become a part of the mass of property in the State of Louisiana. In both taxable situations the property has been withdrawn from commerce at the time of taxation, and since commerce is at an end there can be no tax upon interstate commerce. There is no discrimination

<sup>9</sup>La. R.S. 47:303. In interpreting section 303 the Louisiana Supreme Court in the case **Fontenot vs. S.E.W. Oil Corporation**, 232 La. 1011, 95 So. 2d 638 (1957) stated: "According to this section the person importing an article for use in this state must pay the 'use' tax the same as if it had been sold at retail, and such use shall be considered equivalent to a sale at retail **as of the time of importation**. These provisions, along with the others above mentioned, clearly indicate that the 'use' tax is to be computed on the retail price the property would have brought when imported—that is, its then value or worth." (Emphasis supplied) (95 So 2d 638, 640).

<sup>10</sup>La. R.S. 47:302 A (2).



against interstate commerce because the overwhelming majority of personal property sold at retail in the State of Louisiana subjected to the Louisiana sales tax has entered this State through the channels of interstate commerce. In the vast majority of cases the property which is the subject of the sales tax bears the same relation to interstate commerce that property subjected to the use tax has. Similarly, the use tax applies only in the case where the property has been withdrawn from commerce and has come to rest in the State. The treatment, therefore, by both tax levies is identical.

The imposition of the two complementary taxes absolutely insures that every item of tangible personal property used or consumed within the State of Louisiana is the subject of a 2% excise tax at the moment of its first taking into possession by the consumer for use or consumption. There is therefore perfect equality of treatment of both the taxpayer and the property as of the moment of taxation.

In its effort to insure perfect equality of the tax burden imposed by the sales and use taxes, the Louisiana Legislature provided that a credit be given for all similar taxes paid to another state,<sup>11</sup> thus there can

<sup>11</sup>La. R.S. 47:305 provides in part: "The provisions of this Chapter shall not apply in respect to the use, or consumption, or distribution, or storage of tangible personal property, for use or consumption in this state, upon which a like tax equal to, or greater than, the amount imposed by this Chapter has been paid in another state, . . . If the amount of tax paid in another state is not equal to, or greater than, the amount of tax imposed by this Chapter, then the dealer shall pay to the collector of revenue an amount sufficient to make the tax paid in the other state and in this state equal to the amount imposed by this Chapter."



be no multiplication of the tax burden by successive use and transportation into Louisiana from states imposing a similar tax.

Halliburton's contention that the property acquired by it at casual sales outside of the State may not be the subject of the use tax because to so tax them would discriminate against the out-of-state purchaser in favor of the purchaser within the State of similar property at the casual sale which would be exempt from sales tax, is totally without merit. Any property sold at a casual sale within the State of Louisiana necessarily must have already been the subject of a 2% excise tax, either the sales or the use tax at the moment it was first sold at retail or first brought into the State for use and consumption. On the other hand it is possible that property acquired at casual purchases outside of the State may not have been the subject of a 2% excise tax, and it is the legislative purpose that all property used in the State be the subject of such a tax. If, however, property purchased at a casual sale outside the State has been subjected to a similar tax, the use taxpayer need only show such payment to receive the appropriate tax credit, and thereby he is placed on an equal basis with all other consumers of similar property within the State of Louisiana.

Halliburton's complaint that property manufactured by it outside of Louisiana for its own use within the State of Louisiana may not be the subject of a 2% use tax computed upon the total cost, because to do so

would discriminate against it as a non-resident taxpayer in favor of resident taxpayers similarly situated, is also totally without merit. The purpose of the use tax is to equate the 2% use tax burden with the 2% sales tax burden. Thus, the Louisiana Legislature provided that the first use of tangible personal property within the State of Louisiana is equivalent to a sale at retail<sup>12</sup> and subject to the use tax. The use taxpayer and the sales taxpayer who purchase similar property at retail in Louisiana and of equal value to that property brought into the State by the use taxpayer are subjected to identically the same tax burden and are therefore in equal competitive positions as of the moment of taxation.

Halliburton suggests that if it had manufactured similar equipment within the State of Louisiana for its own use rather than in Duncan, Oklahoma, its sales tax burden would not have been as great because no tax would have been imposed upon labor and shop overhead. In considering this argument of the Appellant, it is well to point out that neither the sales tax nor the use tax is imposed upon labor or shop overhead. Both taxes are imposed upon *cost*<sup>13</sup> to the taxpayer at the moment of taxation. What the cost was

<sup>12</sup>La. R.S. 47:303 provides in part: "For the purposes of this Chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property, shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected. . . ."

<sup>13</sup>"Cost" as defined for use tax purposes is its fair market value as of the taxable moment—or the same price that would have been paid had the property been acquired at retail within the State. *Fontenot vs. S.E.W. Oil Co.* 232 La. 1011, 95 So 2d 638. (1957)

before that moment is of no concern to the State of Louisiana, and what its cost, value, or price is after that moment of taxation cannot be of concern to the State of Louisiana. In the situation where manufacture occurs in Louisiana the consumer purchases or brings into the State component parts which are subject to either a sales or use tax at the appropriate taxable moment, and he may use those component parts in any manner which he may feel benefits his economic interests. His action is no different than that of the great majority of purchasers at retail of tangible personal property. More often than not a sales or use tax taxpayer uses the property upon which a sales or use tax has been paid in conjunction with other property upon which sales or use tax has also been paid in order to obtain an item of greater economic value to him than the separate items had prior to their joint use. This is true even in the case where the housewife purchases cake mix, and milk, and butter and combines them and bakes a cake which has a greater value or cost than the items had separately. Further economic use of property already subjected to a sales or use tax to increase its value is common. Certainly the State is not required to go beyond the taxable moment and assess additional cost or value upon items which have already borne a sales or use tax if they are subsequently combined into a more valuable object.

Halliburton is free to compete in Louisiana on the same basis as any other taxpayer whether he be a resident citizen or a non-resident because in each

case and for each taxpayer the tax is computed upon the cost of the tangible personal property at the first moment it comes into his hands in Louisiana for use or consumption in Louisiana. There is no discrimination.

### ARGUMENT

The authority of a state to levy a sales tax and a complementary use tax is very well settled by the case, *Henneford v. Silas Mason*, 300 U. S. 577; 57 S. Ct. 524, 812 L. Ed. 436 (1936). Appellant does not dispute this power. It is equally well settled that a state may not levy a tax which discriminates against interstate commerce or which does not afford equal taxation to residents or nonresidents. No questions concerning the extent of the state's power to tax are presented:

Appellant here urges that in imposing its use tax on the value of property at the time it became subject to Louisiana's taxing jurisdiction Louisiana in fact discriminated. Appellee submits that its entire sales-use tax structure was drafted with scrupulous regard for uniformity and equality.

#### The Louisiana Sales Tax

The concept of a sales tax imposed upon the retail sales price of tangible personal property has as its basic consideration the placing of the incidence of the tax upon the consumer at the moment the property first comes into his possession for use or consumption. The consumer, therefore, is the "taxpayer". The moment of taxation is the first taking of possession of

property for use or consumption by the taxpayer. The *measure of the tax* is the retail cost of the property at the taxable moment.

No consideration in the tax law is given to what use of the property is proposed or to how the property will be consumed. As a practical matter, no such consideration can be given. It matters not if the moment after sale the property is destroyed without ever being of economic value to the taxpayer. The tax is nonetheless owed on the retail price as of the *moment of taxation*. Nor does it concern the taxing authority that the use to which the taxpayer puts the property may thereafter make the value of the property to the taxpayer many times that paid for it at retail. The tax is nonetheless owed on the retail price as of the *moment of taxation*.

There are four considerations expressed in the Legislative purpose of the *sales tax*:

- (1) The establishing of the *taxpayer*—the consumer.<sup>14</sup>
- (2) The establishing of the *moment of taxation*—the first taking of possession for use or consumption by the taxpayer.<sup>15</sup>
- (3) The establishing of the *measure of the tax*—the cost to the consumer.<sup>16</sup>
- (4) The establishing of the *rate*—2%.<sup>17</sup>

<sup>14</sup>La. R.S. 47:304.

<sup>15</sup>La. R.S. 47:302 A (1).

<sup>16</sup>Ibid.

<sup>17</sup>Ibid.



It is not questioned that a sales tax is a valid exercise of a state's sovereign right to collect revenue through taxation. Like the *sales* tax, a *use* tax is equally a valid exercise of a state's sovereign right to collect revenue through taxation. "A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."<sup>18</sup> Such a tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

Why did Louisiana deem a use tax complementary to the sales tax necessary? To keep from driving the Louisiana consumer to out-of-state markets where it might be possible to purchase tangible personal property not subject to a similar tax thus placing the Louisiana retailer at a disadvantage was apparently not the only purpose. The use tax not only equated the competitive position of Louisiana retailers with the retailer outside Louisiana, it equated the competitive position of all consumers within the State, for it is clearly impossible for anyone to own tangible personal property in Louisiana upon which a 2% tax has not been paid at the first moment it came into the hands of a consumer in the State.

### **The Louisiana Use Tax**

A simple comparison of the four considerations expressed in the Legislative purpose of the *use* tax with those of the sales tax shows them to be identical.

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<sup>18</sup>*Henneford v. Silas Mason Co.*, 300 U. S. 577, 583, 57 S. Ct. 524, 527.

- (1) The establishing of the *taxpayer*—the consumer.<sup>19</sup>
- (2) The establishing of the *moment of taxation*—the first possession for use or consumption by the taxpayer in Louisiana.<sup>20</sup>
- (3) The establishing of the *measure of the tax*—the cost to the consumer.<sup>21</sup>
- (4) The establishing of the *rate*—2%.<sup>22</sup>

The *sales* and *use* taxes are therefore identical taxes. The *taxpayer*, the *moment of taxation*, the *measure of the tax* and the *tax rate* is the same. As of the moment of first taking of possession for use by a consumer in Louisiana all tangible personal property bears a 2% tax computed on the same retail price, "cost", the position of each taxpayer and property similarly situated as of the taxable moment is identical.

It is respectfully suggested that the equal application of the sales and use taxes to all taxpayers whether resident or non-resident answers all the arguments of the appellant, for it would appear that

<sup>19</sup>La. R.S. 47:304.

<sup>20</sup>La. R.S. 47:301(18) and 47:303.

<sup>21</sup>La. R.S. 47:303. In interpreting section 303 the Louisiana Supreme Court in the case **Fontenot vs. S.E.W. Oil Corporation**, 232 La. 1011, 95 So. 2d 638 (1957), stated: "According to this section the person importing an article for use in this state must pay the 'use' tax the same as if it had been sold at retail, and such use shall be considered equivalent to a sale at retail **as of the time of importation**. These provisions, along with the others above mentioned, clearly indicate that the 'use' tax is to be computed on the retail price the property would have brought when imported—that is, its then value or worth." (Emphasis supplied) (95 So. 2d 638, 640).

<sup>22</sup>La. R.S. 47:302 A(2).



there can be no discrimination under such circumstances. However, a particular consideration of each "phase" of complaint may be helpful.

### **Isolated Sale Phase**

*But*, argues appellant, Louisiana grants an exemption from sales tax to an isolated sale within the State and refuse to do so to a similar sale outside the state—this says appellant is discrimination. The answer to this argument is simple. Louisiana lacks competence to tax or exempt transactions occurring outside of its jurisdiction. How can it look to the sale in Oklahoma in determining its tax basis. It can only look to value at the moment the property becomes subject to its taxing jurisdiction. In any event, all property sold at isolated sales within the state has already been the subject of a two percent (2%) tax, either sales or use, upon its first sale at retail, or upon its first use. Further, the State of Louisiana provides a tax credit where the property in question has already been the subject of a similar tax outside the state. If appellant had shown that the property in question had been subject to a similar tax, the State would not have claimed further tax. Here there is perfect equality of treatment.

### **Labor and Shop Overhead Phase**

We are also treated unequally, argues appellant, because some competitor could produce in Louisiana for its own use and thereby escape paying a tax on labor and shop overhead. We are therefore discrim-

inated against, complains appellant, because we are not a Louisiana resident.

Appellant insists that Louisiana is imposing a tax on "labor and shop overhead." The use tax is imposed upon the "cost" of the tangible personal property as of the *taxable moment* when Louisiana first has jurisdiction. As of the moment tangible personal property subject to the use tax becomes taxable such event is considered as a sale at retail, and the measure of the tax is the fair market value or value the property would have brought at a retail sale as of that moment, whether the value at that moment is greater or less than it was at a time prior to becoming subject to Louisiana tax. This is the interpretation of the use tax law as defined by the Louisiana Supreme Court.<sup>23</sup>

In this case cost of materials, component parts, labor and shop overhead were aggregated only because it was a reasonable method of determining value. There is no established market value for such equipment because there is no open market for it. Halliburton never sells its equipment; it only uses it itself.

Halliburton's insistence that the State seeks to tax labor and shop overhead as such is misleading and tends to confuse the issue. In fact, Halliburton and the Collector have stipulated<sup>24</sup> that if Halliburton had manufactured the identical equipment in Louisiana no tax would be imposed on the labor and shop over-

<sup>23</sup>Op. Cit. Supra, f.n. 21.

<sup>24</sup>Transcript of Record, pp. 26 and 27.

head. Labor and shop overhead are not the subject of sales or use tax—only tangible personal property is subjected to the sales and use tax.

The production of equipment in Louisiana for use by the manufacturer is merely one of the multitude of uses to which tangible personal property may be put by the consumer. It is, perhaps, more usual than unusual for purchasers of tangible personal property to combine that property with other property into a more desirable item of tangible personal property. The taxing authority cannot look beyond the taxable moment to what happened before or what happened after such moment. The impossibility of administration and inequity of what appellant suggests the principle of equality requires can be seen by examples illustrating the absurd results of following appellant's argument.

Assume a Louisiana resident, Mr. Jones, desires to construct a cabin cruiser for his own use within the State. He purchases material and parts outside the State for \$5,000.00, and pays 2% use tax thereon. After doing a good job he completes the cruiser which then has a retail value of \$15,000.00. Must the State then come to Mr. Jones and say, "We didn't know you were going to put your purchases to such good use. You must pay an additional tax on \$10,000.00 increased value." Assume further that one year after completing the cruiser the taxpayer re-appoints the boat and installs new engines at a cost of materials of an additional \$10,000.00 upon which he pays a 2%

tax at the moment of first possession for use in the State. On completion of the improvement, the cruiser has a fair retail value of \$50,000.00. Must the State now come again to the taxpayer for an additional 2% on the increased value? Does equality demand such action? If the taxpayer had brought the completed boat into the State, a 2% tax on \$50,000.00 would have been imposed, because that was its value when Louisiana first acquired jurisdiction.

Carrying the absurdity a little further, suppose that the day after the tax was collected on the increased value, the boat burned. May the taxpayer claim a refund because the component parts had no value? If he had imported the ashes, no tax at all would have been charged for there would have been no value at the taxable moment. What happens after the *taxable moment* cannot be considered by the State in administering these taxes.

Would Mr. Jones' neighbor, Mr. Smith, who on seeing Jones' project, decided to build an identical cruiser, purchased the same parts and materials for \$5,000.00 and paid the appropriate tax, but who for lack of ability produced a cruiser of a retail value of only \$2,000.00, be entitled to a refund of tax on \$3,000.00, because after the *taxable moment* the value of the component parts was less than that originally paid? If Mr. Smith had imported his boat on completion outside the State, he would have paid tax only on the \$2,000.00 retail value not the cost of the component parts.

It is easily seen therefore that equality of treatment must depend upon and be determined as of the *taxable moment*, not upon what thereafter is done with such property.

In appellant's situation, all taxpayers, resident or non-resident, who bring similar equipment into the State manufactured for their own use, upon which no similar tax had been paid, would be taxed just as appellant.

Appellant confuses the facts by comparing dissimilar situations, and comparing the facts of his case at the taxable moment with facts existent at a time beyond the moment of taxation. The situations simply are not comparable for determining equality of taxation.

Further evidence that Louisiana seeks to place the 2% tax only on property used within its jurisdiction is shown by the provision contained in Louisiana Revised Statutes Title 47, Section 305, which provides:

"It is not the intention of this Chapter to levy a tax upon articles of personal property imported into this State, or produced or manufactured in this State, for export; . . ."

It should be noted by the Court that on pages 10 and 11 of its brief, Appellant in setting forth portions of Section 305 omits the words "or produced or manufactured in this State, for export;" thus leaving an erroneous impression as to the meaning of the section.

Appellant, like any other taxpayer whether resident or non-resident, is free to situate his business

where he feels he enjoys the best competitive position. Each possible location undoubtedly has its advantages and disadvantages. Local taxes are always a consideration for management. In Louisiana all taxpayers enjoy the same treatment as of the *taxable moment* and all are equally free to use whatever advantages their managerial skill may devise. Each taxpayer is in the same position in regard to Louisiana sales and use tax at the moment the tax is imposed.

In answer to Appellant's repeated suggestion that Louisiana imposes a penalty tax upon it because it produces outside the State, we again point out that neither the place of production nor the residence of the taxpayer is of consideration in imposing the tax. The tax is imposed for one reason only—because the property has become a part of the mass of property in the State and has not yet been subject of a sales or use tax either within the State of Louisiana or in another state. The cost as of the *taxable moment* is the basis of computation. The tax is computed on "cost" as of that moment and prior or subsequent use, value or cost are immaterial to the State insofar as the use tax is concerned.



**CONCLUSION**

It is submitted that the decision of the Louisiana Supreme Court should be affirmed.

Respectfully Submitted,

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December 29, 1961



**PROOF OF SERVICE**

I, Chapman L. Sanford, attorney for the Collector of Revenue of the State of Louisiana, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the twenty-ninth day of December, 1961, I served a copy of the foregoing *Brief for the Appellee*, upon the following named persons, by mailing—postage prepaid—copies to each of them at their offices at the respective addresses set out opposite the name of each, viz.,

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1961

No. ~~204~~ 24

**HALLIBURTON OIL WELL CEMENTING COMPANY,**

**Appellant**

*versus*

**JAMES S. REILY, COLLECTOR OF REVENUE, STATE  
OF LOUISIANA (Since Succeeded by Robert L. Roland,  
Who Was Duly Succeeded by Roland Coereham),**

**Appellee**

**ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF LOUISIANA**

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1961

No. 264

**HALLIBURTON OIL WELL CEMENTING COMPANY,**

Appellant

*versus*

**JAMES S. REILY, COLLECTOR OF REVENUE, STATE  
OF LOUISIANA (Since Succeeded by Robert L. Roland,  
Who Was Duly Succeeded by Roland Cocreham),**

Appellee

---

**ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF LOUISIANA**

---

**REPLY BRIEF FOR THE APPELLANT**

---

*May It Please the Court:*

**The Positions Taken by the Louisiana Collector**

- 1. What Are Those Positions?**
- 2. The Fallacies of Each.**

The Collector's brief is somewhat difficult to analyze because the Collector does not "stay put," but vacillates between two inconsistent positions.

We submit that the following is an accurate and fair analysis of the situation, and of the Collector's varied positions:

Halliburton asserted its propositions as follows:

- |                    |  |
|--------------------|--|
| A. THE LAW:        | Tax discrimination against interstate commerce is forbidden by the Federal Constitution. This is the rule. |
| B. THE FACT:       | The Louisiana Tax Collector is discriminating against interstate commerce.                                 |
| C. THE CONCLUSION: | The discrimination by the Louisiana Tax Collector is an unconstitutional burden upon interstate commerce.  |

Facing these propositions, the Collector could take only three possible positions:

- (1) He could *admit* the propositions.
- (2) He could *deny* the propositions.
- (3) He could *confess and avoid*.

This is axiomatic.<sup>1</sup>

With reference to Halliburton's first Proposition "A," "*The Law*," the Louisiana Collector has "admitted." He states:

---

<sup>1</sup> See Paton, George W., *A Text Book of Jurisprudence*, 2nd Ed., 1951, Oxford University Press, Amen House, London, E.C. 4th, England, at p. 479.



"We concede that the State of Louisiana may not impose taxes designed to favor its own residents and to tax more heavily non-residents."<sup>2</sup>

\* \* \*

"The Constitutional Principles that a state may not discriminate against interstate commerce and that a state may not place a more onerous burden on a non-resident taxpayer than it does upon a resident taxpayer in similar circumstances are well established.

\* \* \*

"The State of Louisiana does not quarrel with those established principles."<sup>3</sup>

\* \* \*

"It is . . . well settled that a state may not levy a tax which discriminates against interstate commerce or which does not afford equal taxation to residents . . . [and] non-residents."<sup>4</sup>

The Louisiana Collector thus admits Halliburton's Proposition "A," "*The Law*," that the interstate commerce clause forbids tax discrimination against interstate commerce. This leaves for discussion only the correctness of the propositions:

- |                    |  |
|--------------------|--|
| B. THE FACT:       | The Louisiana Tax Collector is discriminating against interstate commerce, and                           |
| C. THE CONCLUSION: | The discrimination <sup>o</sup> by the Collector is an unconstitutional burden upon interstate commerce. |

<sup>2</sup> Brief of the Appellee, at p. 2.

<sup>3</sup> *Ibidem*, at p. 11.

<sup>4</sup> *Ibidem*, at p. 18.

Proposition "B" is a conclusion of fact, whether or not there is discrimination, and Proposition "C" is a conclusion of law to be drawn by the application of the legal proposition "A" to the facts "B."

What does the Collector say about Halliburton's Proposition "B," *The Fact*?

Having admitted Proposition "A," the Collector could avoid the conclusion of Proposition "C" in only one of two ways:

*First:* He could *deny* Proposition "B" that there is in fact any discrimination against interstate commerce.

or

*Second:* He could *confess and avoid* Proposition "B," i.e., he could concede that there was discrimination, and he could argue that such discrimination was not prohibited by the Federal Constitution, for some reason which is an exception to the general rule.

A careful examination of the Collector's brief shows that he shifts back and forth between these two positions. To put him in a frame of reference that can be dealt with, we submit that he has taken both positions, that is to say:

*First:* He denies that there is any "discrimination,"

AND

*Second:* He argues that the "discrimination" here is a *justifiable discrimination* which does not offend the interstate commerce clause.

The Collector has not made these arguments in the alternative. He has made them simultaneously despite the obvious conflict and inconsistency. This is the reason that it is somewhat difficult to untangle and reveal the speciousness of his positions. As heretofore indicated, there is a substantial lack of correlation between the Collector's Brief to the Louisiana Supreme Court, his Motion to Dismiss, and his present Original Brief. However, we submit that the foregoing is a fair analysis of the shifting sands upon which, from time to time, he has chosen to stand.

### **The Collector's Present Avowed Position—Denial—**

Although he has not consistently taken this position, the Collector's current official position, with reference to the existence of tax discrimination against interstate commerce, is that of a flat denial.

The Louisiana Collector states, in his brief,

"... A state may not discriminate against interstate commerce.

"The State of Louisiana does not quarrel with those established principles.

"Louisiana does, however, emphatically *deny* that its sales and use tax laws are in contravention of those principles.

"... the ... tax law reveals ... perfectly complementary taxes ...

(at pp. 10-11)

"There is no discrimination against interstate commerce.

(at pp. 13-14)

"There is . . . perfect equality of treatment . . .

(at p. 14)

"The purpose of the use tax is to equate the 2% use tax burden with the 2% sales tax burden . . .

(at p. 16)

"Both taxes are imposed upon cost . . .

(at p. 16)

"In Louisiana all taxpayers enjoy the same treatment . . .

(at p. 27)

And, summarizing his position, the Collector says:

"The sales and use taxes are . . . identical taxes.

"The taxpayer, the moment of taxation, the measure of the tax and the tax rate is the same."<sup>5</sup>

(at p. 21. Emphasis by the Collector)

<sup>5</sup>"Cap, what I tell you three times, is true," Carroll, Lewis, *Alice's Adventures in Wonderland, Through the Looking Glass and The Hunting of the Snark*, Random House—Modern Library Edition, New York, at p. 321. From *The Hunting of the Snark*, "The Landing," 2nd Stanza, fourth line.

### **The Collector's Denial of Fact Is Not Supported by the Record.**

The unsoundness of the Collector's "denial" position readily appears from the Stipulation of Facts and from basic arithmetic.

The issue of fact here is simply whether or not the Louisiana sales and use tax statute does "... in its practical operation work discrimination against interstate commerce."<sup>6</sup>

The Collector argues that the percentage rate of both taxes is fixed at 2%. Thus, he says that the "rate of tax" is the same in both taxes. He is correct on this point.

But when he applies this identical 2% tax rate to the two situations, he produces for Halliburton's interstate situation a tax burden of \$40,642.65, which he stipulates would not be due if Halliburton's operation were wholly intra-state.

Obviously two "identical taxes" cannot produce unequal results.

Elementary arithmetic tells us that, if the same percentage factor (2%) is applied to two situations, and a different tax dollar result appears, then the tax base (to which the 2% is applied) must be different.

Mathematicians tell us that, in dealing with two positive quantities, one of three circumstances must exist: Either A is equal to B, or A is less than B, or A is greater than B.

Here the issue is one step simpler than that: Either A is equal to B, or A is greater than B.

<sup>6</sup> Best v. Maxwell, 311 U.S. 454, 61 S.Ct. 335, 85 L.Ed. 275 (1940).

<sup>7</sup> *Encyclopedia Britannica*, 1957 Edition, Verbo "Arithmetic," Vol. 2, p. 355.

Appellee, the Louisiana Collector says:

"There is . . . perfect equality."

(Brief of Appellee, at p. 14)

Appellant, Halliburton, says:

"There is inequality. The taxes are not 'identical.'"

A dispute as simple as that ought not to be difficult to resolve.

Appellant respectfully submits that this simple issue may be clearly resolved by seeking the answer to one simple question, namely:

If the Louisiana Collector be upheld in his position, would the tax burden upon Halliburton be no greater than that burden would be if Halliburton moved its shops to Louisiana and operated a wholly intra-state business?

Restated:

If the elements of multi-state operation and interstate movement of goods were eliminated from the operative facts of this case, would the tax demanded by the Louisiana Collector be exactly the same, or would it be less?

Restated:

If there were in Louisiana a direct competitor of Halliburton, carrying on a wholly intrastate operation, would that competitor be required to pay exactly the same number of dollars (in sales and use tax moneys) or would its sales and use tax burden be smaller than that of Halliburton which carries on a multi-state operation and moves its equipment in interstate commerce?

Of course, the answer to these direct questions is not debatable. The answer is found in the Stipulation of Facts upon which this case is submitted.

In this case, the Louisiana Collector demands that Halliburton pay \$40,642.65 in tax dollars; under the Louisiana sales and use tax statute. Simultaneously, the Louisiana Collector has stipulated, as to the two phases of this case,

*First:* As to the Labor and Shop Overhead Phase—

"If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on materials purchased outside Louisiana; but there would have been no Louisiana sales tax or use tax upon the Labor and Shop Overhead."

(R. 26-27)

*Second:* As to the Isolated Sales Phase—

"... the entire ... [purchase price] would not have been subject to the Louisiana Sales Tax or Louisiana Use Tax had the purchase of such equipment been made within the State of Louisiana."

Appellant taxpayer respectfully asserts that it is unable to see any complexity to the problem. Absent the elements of multi-state activity and interstate movement of goods, the Collector demands no tax. Add the elements of multi-state activity and interstate movement of goods, and the Collector demands the tax. This, appellant submits, amounts to discrimination which is offensive to the interstate commerce clause of the Federal Constitution. Q.E.D.



In the face of his own stipulation that he would thus discriminate, how does the Collector couch his arguments that "... there is perfect equality ..." in the two (intrastate and interstate) situations?

Without articulating that this is what he is doing, and thoroughly intermingling his two arguments, the Collector nevertheless shifts away from his official "denial" position and adopts the "confession and avoidance" technique of defense.

The Collector totally ignores and passes over the simple fact that, if the taxes were "identical" in their "practical operation," they could not produce substantially different tax results. He does not mention this fundamental discrepancy in any of his briefs to any court. He makes no effort to explain how an "identical" tax which "... provides perfect equality of tax treatment ..." could produce \$40,642.65 more taxes in the interstate situation than it produces in the intrastate situation.

Having asserted his "denial" of discrimination, and having passed without comment the unequal tax result, and ignoring his own stipulation, the Collector proceeds to the main portion of his brief to this Court. We submit that, although he has not told the Court that this is his plea of "confession and avoidance," nevertheless his primary arguments may accurately be so characterized.

### **The Collector's Actual Position— Discrimination Is Justifiable.**

Let us examine the Collector's "confession and avoidance" pleas. What has he said to support his position that the stipulated "discrimination" is justifiable and not unconstitutional?

**First: The Discrimination Is Only Incidental,  
and Is De Minimis—**

In his Motion to Dismiss (at p. 9), the Collector argued that the discrimination was only incidental and *de minimis*. He put it this way:

"Louisiana has accomplished *almost* perfect equality of the 2% tax burden."

This is one of the Collector's arguments which was echoed and adopted by the Louisiana Supreme Court, when it concluded that:

"... the law contains no ... discrimination; ..."

"Labor and shop overhead are considered *incidentally* ... as a basis for arriving at cost."<sup>8</sup>

This plea of justifiable discrimination has been considered at some length at pp. 58-60 of Appellant's Original Brief and, we submit, has been fully refuted. We have shown (at p. 59) that for Halliburton and the seven taxpayers who filed briefs *amicus curiae*, the tax moneys dependent upon this issue were not *de minimis* dollarwise. In round figures, a quarter of a million dollars difference, in tax moneys, is involved in the tax years already at issue. And similar taxes accrue from year to year.

In Halliburton's case, the labor and shop overhead, which the Collector seeks to include in the tax base, amounted (for 1952 through 1955) to the sum of \$1,547,109.70. (R. 28) It is 2% of this sum (included in the tax base) which produces the \$30,942.20, the principal sum demanded upon the labor and

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<sup>8</sup> See full quotation in Appellant's original Brief, at p. 38.

shop overhead phase of this case. (R. 24) We submit that the inclusion or exclusion of \$1,547,109.70 from a tax base is a matter which cannot be described as *de minimis*. We submit that the discrimination here is "substantial."

Lest it be argued that the discrimination is only large in dollars and not in the proportion of the total tax, we point out that, in Halliburton's case:

	Dollars	Per Cent
Cost Element No. I (components) amounted to.....	\$ 717,992.69 <sup>9</sup>	31.7%
and		
Cost Element No. II (labor and overhead) was .....	1,547,109.70 <sup>10</sup>	68.3%
<b>TOTAL COST</b> .....	<u><u>\$2,265,102.39</u></u>	<u><u>100.0%</u></u>

Arithmetic tells us here that 68.3% of the use tax levied upon Halliburton in this particular case was dependent upon the inclusion in its tax base of the labor and shop overhead (Cost Element No. II) which the Collector, by stipulation, would exclude from the tax base if Halliburton operated wholly in Louisiana.

Put another way, the Collector now seeks to tax Halliburton more than 300% of what the tax would be if Halliburton moved its shops to Louisiana. The discrimination here is not *de minimis* either in dollars or in the percentage of tax moneys involved.

As to the "isolated sales" phase, the "ratio" of discrimination is 100%-to-zero.

<sup>9</sup> Col. 2, Annex 10 to Halliburton's Original Petition. R. 28.

<sup>10</sup> Col. 5, Annex 10 to Halliburton's Original Petition. R. 28.

For obvious reasons, the Collector has abandoned his contentions that the discrimination is only *incidental* and *de minimis*. That line of argument does not appear in the brief on the merits.

**Second. This Is Not an Interstate Commerce Problem!**

To justify his stipulated substantial discrimination, the Collector argued to the Louisiana Supreme Court that there is no question of interstate commerce involved. Appellant has never understood how such an argument could be seriously advanced, but it was advanced by the Collector and it was adopted and echoed by the Louisiana Supreme Court, viz.,

"We find that the instant matter does not involve a question of interstate commerce."

(R. 49)

In sum, the Louisiana Supreme Court, following the Collector's argument, held that although there was discrimination against Halliburton this was all right, because "... the ... matter does not involve a question of interstate commerce."

The Collector argued this point in his Motion to Dismiss (at pp. 10 and 13), saying that for Halliburton, this is

"... *not an interstate commerce problem* but a problem of management in locating and so arranging its operations in such a manner as to reduce its cost of operations to a minimum.

[and]

"... taxpayer may reduce his tax burden by manufacturing equipment within Louisiana, for his own use."

Appellant has discussed this amazing argument in its

original Brief, at p. 65, under the heading: "*A Problem of Management. Save Louisiana Taxes by Manufacturing in Louisiana.*"

At page 5 of his brief, the Collector argues:

"The trial court agreed with Halliburton and rendered judgment in its favor.

"On appeal by the Collector the Louisiana Supreme Court found that use tax is imposed after commerce is at an end; . . ."

At page 13, he argues:

"... the property has been withdrawn from commerce at the time of taxation, and since commerce is at an end, there can be no tax upon interstate commerce."

In the *Silas Mason* case, Mr. Justice Cardozo made it clear that this type of reasoning could not justify discriminatory taxation. He said:

"The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, *non-discriminatory* in its operation, when they have become part of the common mass of property within the state of destination . . .

\* \* \*

"For like reasons they may be subjected, when once they are at rest, to a *non-discriminatory* tax upon use or enjoyment."<sup>11</sup>

It is completely clear that the arguments here advanced by the Collector cannot be used to justify "discriminatory" taxation.

---

<sup>11</sup> 300 U.S. 582, 583. Italics supplied.

Despite the clear words of Mr. Justice Cardozo, the Collector (toward the end of his brief) seems to feel that he can justify a frankly discriminatory tax because interstate commerce "... is at an end." The very last paragraph of the Collector's brief contains this emphatic language:

"The tax is imposed ~~for one reason only~~—because the property has become a part of the mass of property in the state . . . ." (Appellant's Brief at p. 27. Emphasis supplied.)

Noting the three-to-one ratio of discrimination which exists here, against the interstate transaction, we submit that there is no theory upon which it can be justified constitutionally. It matters not whether this case be regarded as one of discrimination against interstate commerce, or as one of denial of due process of law by arbitrary and discriminatory taxation, or as a denial of equal protection of the laws.

Due process of law demands that

"... the law shall not be unreasonable, arbitrary or capricious . . . ."

If this is not a discrimination against interstate commerce because "commerce is at an end," then it is arbitrary and discriminatory classification—for tax purposes—the separate (and heavier) tax treatment being based solely upon the history of there having been interstate movement of goods. No matter how thin the argument is sliced, the Collector is still demanding *three-times-as-much-tax* as he would demand if there were no multistate activity and interstate movement of goods. No operative fact distinguishes the two situations

• *Nebbia v. New York*, 291 U.S. 502, at p. 525, 54 S.Ct. 505, 78 L.Ed. 940 (1934).

except the existence in one case, and the non-existence in the other, of the interstate commerce element.

We submit that the interstate commerce clause, and the due process clause, and the equal protection of the laws clause, sufficiently arm this Court with power to prevent Louisiana from openly impeding the interstate movement of goods.

Aside from the operations of the interstate commerce clause, we submit that the *due process* clause and the *equal protection of the laws* clause would suffice to strike down the arbitrary and unreasonable discrimination which the Collector would practice here.\*

\* \* \*

Having confessed the discrimination, the Collector may not "avoid" the conclusion of unconstitutionality by contending that "... the property has been withdrawn from commerce at the time of taxation."

### **Third. Discrimination Is a Matter of Semantics.**

The next confession and avoidance plea of the Collector lies in his effort to convince this Court that—although there is a substantial *de facto* tax discrimination against interstate operator here, to the extent of better than three-to-one, this is not really and truly unconstitutional discrimination because the Collector is *able to describe* the two tax situations in *similarly sounding words*.\*

His undocumented argument runs like this:

"In order to levy any tax, a legislature must establish four considerations:

(1) It must designate who the *taxpayer* will be.

\* See p. 38, below, under heading *Equal Protection of the Laws—Due Process*, for further discussion of this point.



- (2) It must establish the . . . *taxable moment*.
- (3) It must establish the *bases* upon which the tax will be computed.
- (4) It must establish the *rate* of the tax."  
(at p. 11)

Then the Collector asserts:

"The *sales* and *use* taxes are . . . identical taxes.

"The *taxpayer*, the *moment of taxation*, the *measure of the tax* and the *tax rate* are the same."

(Brief of Appellee, p. 21,  
Emphasis by the Collector)

Close examination of the arguments made by the Collector reveals that, although the *tax rate*, at 2%, is indeed the same in both taxes, nothing else set forth in the last quoted statement is correct.

### **The Taxpayers Are Not the Same.**

If one follows the Collector's comparison, the taxpayers which he chooses to compare are not the same. He chooses to compare the acts of a purchaser-at-retail in Louisiana with the activity of Halliburton which is a manufacturer-user, using its own work product. See Appellant's original Brief, at p. 60, under the heading: "*The Collector Would Compare the Incomparable.*"

Appellant respectfully submits that the only proper comparison, to test for the presence or absence of discrimination, is to compare the operations of a manufacturer-user in the two situations, one a manufacturer-user with multi-state operations and interstate movement of goods, the other a manufacturer-user in an identical operation absent only the factor

of multi-state operations and interstate movement of goods. Such a comparison is studiously avoided by the Collector because it is fatal to his position. On this point, we respectfully refer this Court to the excellent statement from the brief *amicus curiae* of Chicago Bridge and Iron Company, which we have quoted at page 61 of Appellant's original Brief.

As was pointed out in Appellant's original Brief, one of the Collector's basic fallacies is that he would ignore (and would have the Court ignore) the fact that Halliburton is a manufacturer which uses its own product. Halliburton is a "manufacturer-user" or "producer-consumer." This is an important operative fact.

We respectfully focus the attention of the Court upon the fact that Halliburton is a "manufacturer-user," in whose operation there exists the element of multi-state activity and interstate movement of goods.

We respectfully suggest that the test for discrimination versus non-discrimination can be fairly made by comparing Halliburton's tax burden (as asserted by the Collector) with that of an identical "manufacturer-user" in exactly the same situation, absent only the elements of multi-state activity and interstate movement of goods. We assert that this is the one and only comparison that can be made fairly.

The taxpayers compared by the Collector are *not* the same.

**The Tax Bases (and the "Taxable Moments")  
Are Not the Same.**

It is here that the Collector has fully exerted the thrust of his argument and most fully propounded his error.

The tax rate (at 2%) is the same for both taxes. And, if we choose the *taxpayers* (fairly) for the comparison, i.e., an intrastate "manufacturer-user," and an interstate "manufacturer-user," this leaves for consideration only the Collector's criteria numbered "(2)" and "(3)," namely

(2) "the taxable moment," and

(3) "The bases upon which the tax will be computed."

At the outset, it should be noted that the Collector's criterion, "Moment of Taxation" is not really a third independent criterion. It is merely one of the factors used by the Collector in arriving at his tax "bases." He says "... both taxes are based upon cost." But he reaches two different figures for "cost" in the two situations by using two different "moments of taxation."

It is of interest that the Collector uses the word "bases" in the plural. For, of course, it is by the use of two different tax bases that he achieves two different tax results. If the tax rate is the same (2%) in each case—and it is—then, of course, the unequal tax result could only be reached by the application of that rate to two different bases.

The Louisiana Collector purports to apply the 2% tax rate to identical bases. He puts it this way:

"Both taxes are imposed upon *cost*<sup>12</sup> to the taxpayer at the moment of taxation."<sup>13</sup>

Thus the Collector tells us that he applies both taxes to "cost."

<sup>12</sup> Italics by the Collector.

<sup>13</sup> Appellee's brief, p. 16.

Let us consider what elements go into the "cost."

We are considering the ultimate "use" of complex mobile scientific equipment. Photographs of this equipment appear at R. 16 and 17.

As to this equipment, before it could be "used" at all, the manufacturer-user necessarily incurred two separate and substantial elements of "cost," namely:

- I. The "cost" of the *physical components*, e.g., the truck chassis, the scientific instruments, etc. (About *one-third* of total "cost.")
- II. The "cost" of the *labor and shop overhead*, necessarily incurred to convert the components into a usable end-product. (About *two-thirds* of total "cost.")

The Louisiana Collector has simply elected to include both of these elements of "cost" (I. and II.) when he fixes the tax base for the inter-state tax, whereas, in the intra-state tax, he would exclude Element No. II (the labor and shop overhead) from the tax base.

The physical and economic activity of the taxpayer, Haliburton, (and of its intra-state competitor, if it had one) is properly and completely described as follows:

*First: The Manufacturing—*

Step No. 1. The taxpayer purchased certain physical components.

And incurred certain "cost" (Cost Element No. I) in so doing.

Step No. 2. The taxpayer improved those physical components, and converted them into a usable finished product.

And incurred additional "cost" (Cost Element No. II) in so doing.

*Second: The Using—*

The taxpayer used that end product, under contract, to service oil wells in Louisiana.

The Louisiana Collector has arrived at the two different tax "bases" by choosing two different "moments of taxation." In the interstate situation, he fixes his "moment of taxation" at the end of the manufacturing phase, thus including in his tax base both Cost Element No. I, (the components) and Cost Element No. II. (the labor and shop overhead). On the other hand, in the wholly intrastate situation, he fixes his "moment of taxation" at the end of Step No. 1 of the manufacturing phase, thus excluding from the tax base Cost Element No. II.

By shifting what he describes as "... the taxable moment . . .," the Collector would:

- A. In the case of the sales tax (intra-state tax) fix the "taxable moment" *before* the expenditure of labor and overhead.
- B. In the case of the use tax (inter-state tax) fix the "taxable moment" *after* the expenditure of the labor and overhead.

But, the Collector's ultimate result is clear—In the wholly intra-state situation, he would not apply the 2% tax to the labor and shop overhead element of cost. Only where there is the added element of multi-state activity and interstate

movement of goods would the Collector tax the labor and shop overhead element of cost. This, we submit, is "discrimination" against the interstate transaction.

The Collector has reached the two different tax results by choosing two different "taxable moments" thus producing two different tax "bases" upon which to apply his 2% rate.

Yet he inaccurately argues:

"The sales and use taxes are . . . identical taxes. The taxpayer, the moment of taxation, the measure of the tax, and the tax rate is the same. . . ." (at p. 21)

The Collector would have us lose sight of the fact that he has fixed two different taxable moments. He refers to "the" taxable moment. He says:

"Both taxes are imposed upon cost to the taxpayer at the moment of taxation. What the cost was before that moment is of no concern to the State of Louisiana, and what its cost, value or price is after that moment of taxation cannot be of concern to the State of Louisiana."<sup>14</sup>

The Collector would be correct, and it would be of no concern to Louisiana to equate the two taxes, were it not for the fact that the interstate commerce clause, and the due process clause, and the equal protection of the laws clause, of the Federal Constitution forbid discriminatory taxation of interstate commerce. Wherever ". . . in its practical operation . . ." a tax discriminates against interstate commerce, it is void. Multi-state activity and interstate movement of goods cannot, in themselves, constitutionally generate an additional tax burden.

<sup>14</sup> Appellee's Brief, at pp. 16-17. Emphasis supplied.



**Discrimination in the Tax Bases Could Be Avoided  
—In Two Ways—**

By his repetitive assertion that the two taxes are "... perfectly complementary ..." and provide "perfect equality of treatment ..." the Louisiana Collector acknowledges the duty of the State of Louisiana to equate the inter-state tax and the intra-state tax.

Louisiana could provide equality of treatment in either of two ways: The State could include Cost Element No. II. (labor and shop overhead) in the tax base of the intrastate situation, or the State could exclude Cost Element No. II. from the tax base of the inter-state situation. Either of these methods would abolish the inequity (the "discrimination") of which appellant here complains. But what Louisiana cannot constitutionally do is to include in the tax base of the multi-state operator a substantial element of cost, while at the same time excluding that element of cost from the tax base of the intra-state operator whose activities are the same except for the absence of inter-state movement.

What Halliburton "used" in Louisiana was not the collection of raw components, but its complex finished product, in the production of which it has incurred both Cost Element No. I. and Cost Element No. II.

If Halliburton were to move its fabrication shops into Louisiana (as the Collector suggests that it do if it would avoid this tax),<sup>15</sup> again the item which it would ultimately "use" in Louisiana would be the finished end-product.

<sup>15</sup> See Appellant's original Brief, at p. 65, for discussion of this unusual argument.



Now, if the Louisiana tax law did, in fact, tax the labor and shop overhead of the intra-state manufacturer-user (as well as that of the interstate manufacturer-user), then Halliburton would have no complaint here. There would be "perfect equality of treatment."

But the Collector has stipulated that, under the Louisiana tax law, the labor-and-shop-overhead element is taxed only in the interstate situation. And from the Collector's published letter ruling, of July 13, 1956,<sup>16</sup> which is most interesting, we learn that in the wholly intra-state situation "... direct labor charges [are] deductible in arriving at the cost basis ..."

In contrast, by his letter ruling of October 10, 1956,<sup>17</sup> the Collector tells us that in the inter-state situation "cost" includes not only "the materials used," (Cost Element No. I), but also the cost of "... fabrication and assembly, labor [and] overhead, ... ." (Cost Element No. II.). The Collector's stipulation is, of course, in accord.

Appellant taxpayer remains unable to read any complexity into this problem. The Collector has stipulated that he would demand his tax only where there is multi-state activity and inter-state movement of goods. There is no other operative fact to distinguish the non-taxable situation and the situation in which the Collector demands his tax money. The Federal Constitution forbids such discrimination against interstate commerce.

Using similarly sounding words, the Collector has argued that in both the use tax and the sales tax the "moment of

<sup>16</sup> See Appendix B, Appellant's original Brief, at pp. 83-84.

<sup>17</sup> Appellant's original Brief, pp. 14-15.

taxation" is the same and that the "tax bases" are the same. In fact, the Collector has chosen two different "moments of taxation," in order to produce two different tax bases. He properly uses the word "bases" in the plural. For the interstate operator (Halliburton), he chooses a "moment of taxation" *after* the entire manufacturing process has been completed. For the intrastate operator, the Collector has chosen to fix his "moment of taxation" midway in the manufacturing phase of the operation, just *after* the purchase of components and just *before* the expenditure of *labor and overhead*. Thus, by increasing the tax base, he would increase the tax burden of Halliburton to 300% of what that burden would be for an intrastate operator "in similar circumstances."

We submit that the Collector has selected two different tax bases; that he is incorrect when he contends that "the taxes are identical. The measure of the tax is the same." Since the rate is the same, at 2%, if the tax "bases" were the same, the tax result would be the same. But it is not so here. *Ergo*, the bases are not the same.

The Collector has talked about the two situations in similarly sounding words but—in truth and in fact—

- a. The "taxpayers," in his comparisons, are *not* the same.
- b. The "moments of taxation" are *not* the same.
- c. The tax bases (the measures of the two taxes) are *not* the same.

#### **Fourth: Lack of Jurisdiction to Not Tax**

To further confess and avoid, the Collector argues ob!

quely, throughout his brief, that somehow Louisiana lacks jurisdiction to equate the interstate tax with the intrastate tax, even assuming a gross discrimination. And, at p. 22 of his brief, the Collector argues directly that:

"Louisiana lacks competence to tax or exempt transactions occurring outside of its jurisdiction. How can it look to the sale in Oklahoma in determining its tax basis? It can only look to value at the moment the property becomes subject to its taxing jurisdiction."

We respectfully submit, without laboring the point, that when Louisiana comes to fix the tax base for the use tax, upon the use of equipment imported to Louisiana from Oklahoma, Louisiana has *jurisdiction to exclude* from that tax base any element of cost which it excludes from the tax base of one who operates entirely within Louisiana. Louisiana has *jurisdiction to not tax* any element in the interstate case which it chooses to *not tax* in the intrastate case. Louisiana not only has such jurisdiction to exclude, the interstate commerce clause requires its exercise in this case.

We submit that Louisiana has ample jurisdiction and power to equate the two tax situations by doing one of two things:

*Either*, Louisiana can include the labor and shop overhead in the tax base of the intrastate operator, as well as in that of the interstate operator. Surely it lacks no jurisdiction to do this.

*Or*, Louisiana can exclude the labor and shop overhead from both situations, interstate, as well as intrastate. Obviously, Louisiana has jurisdiction to "not tax" this Cost Element No. II. in both cases.

The Collector argues:

"... Louisiana lacks competence to . . . exempt transactions occurring outside its jurisdiction: . . ."

He argues that Louisiana cannot consider any facts that occurred outside Louisiana.

The gross sophistry of this argument is revealed by the mandate of the Sales and Use Tax Statute. Louisiana must look outside the state and into the past, and give credit for sales taxes already paid in other states. At page 14 of the Collector's brief he argues this point, and cites the statute, as showing the equitable nature of the Louisiana tax law.

We respectfully submit that the idea of "... lack of jurisdiction to *not* tax . . ." is a new concept in Anglo-American jurisprudence; that it is utterly without validity.

#### **Fifth: Good Intentions May Excuse Discrimination**

Throughout his brief the Collector argues that the Louisiana Legislature *intended* to provide equality of treatment to the interstate and the intrastate transactions. He cites Section 305<sup>18</sup> for the statement of legislative intent. He argues that such lip service is enough to satisfy the interstate commerce clause. He takes the position that discrimination in fact is excusable if there is a statement of intention not to discriminate.

<sup>18</sup> Appellee's Brief, at p. 22.

<sup>19</sup> R.S. 47:305, reproduced at p. 81 of Appellant's Original Brief.

We submit that the tax result actually reached—and not the words of the statute nor the motive and intent which prompted its passage—is the only criterion which can be used here.

We submit that this argument by the Collector is wholly specious.

### **Mr. Jones' Boat. The Collector's Hypothesis.**

At pages 24-25 of his Brief, the Collector has assumed that a Louisiana resident purchased materials and parts for a cabin cruiser for \$5,000, and that he paid his 2% tax (under the sales and use tax law) on that \$5,000.

The Collector then supposes that by the expenditure of labor and overhead, Mr. Jones has produced a boat which has a "retail value" of \$15,000. Describing his own question as an "absurdity," the Collector asks:

"Must the State now come again to the taxpayer for an additional 2% on the increased value? Does equality demand such a thing?"

(at p. 25)

Since the tax statute speaks of "cost price" and not of "retail value," we will change this hypothesis slightly and say that, Mr. Jones bought his component parts for \$5,000 (Cost Element No. I.) and then employed workmen to build the boat for him, at an additional cost, for labor and overhead (Cost Element No. II.) in the sum of \$10,000. When finished, the total "cost" of the boat would be:

Cost Element No. I (components)	\$ 5,000.00
Cost Element No. II (labor and overhead)	10,000.00
TOTAL "cost"	<hr/> \$15,000.00

Now, let us ask the Collector's (absurd?) question. Does equality demand that the State come again to the taxpayer for an additional 2% on the increased "cost"?

If the Collector is to be upheld in collecting 2% of the total "cost" (on both Cost Elements I and II) in the interstate situation, then we say that the answer to the Collector's question is "Yes." Equality does demand the same tax treatment of the intrastate situation.

Suppose that our Louisianian, Mr. Jones, after he bought the \$5,000 worth of components (Cost Element No. I incurred) decided not to have it built in Louisiana, and concluded that it would be a good idea to have these components put together at a shipyard in Biloxi, Mississippi. And suppose that he took his components to Biloxi and had the boat built there. Then suppose he floated it, or trailed it, back into Louisiana, across the interstate boundary line. Now, what taxes would the Louisiana Collector demand under the sales and use tax statute?

Clearly, the situation here would be precisely analogous to the present Halliburton situation. Because the manufacturing phase of the operation occurred outside the state, the Collector would demand a 2% tax on the entire cost, namely, I. cost of components and II. cost of labor and overhead ex-

<sup>a</sup> Assuming, hypothetically, that Mississippi had no sales tax.

pendent to convert the raw components into an end-product suitable for use.

Again, we say that Louisiana has a clear choice of two methods in which to equate the tax treatment of the two situations. Louisiana could include both Cost Elements (I. and II.) in the tax base in the intrastate situation, and in the interstate situation; or, it could exclude Cost Element No. II. (Labor and overhead) from the tax base in the interstate situation, as well as in the intra-state situation.

But, what Louisiana cannot constitutionally do is to include the labor and overhead in the tax base of the interstate operator while excluding it from the tax base of the wholly intra-state operator. The interstate commerce clause compels the Collector to administer his tax statute so that "... in its practical operation ... it will not ... work discrimination against interstate commerce. ..."

Amazingly—among the number of contradictory and specious arguments which the Collector has advanced, and then abandoned, during the course of this litigation—, the Collector once argued that Louisiana did equate the taxes by taxing the labor and overhead in the *intrastate* situation! It is agreed that the entire record may be referred to, by counsel, and the Collector's brief to the Louisiana Supreme Court is a part of that record. At pages 3-4 of his Brief to the Louisiana Supreme Court, the Collector argued:

"The Collector certainly does not concede, however, that one who manufactures equipment for his own use in Louisiana does not owe a use tax upon the entire value or 'cost' of the completed item, subject to a credit for



the sales tax paid for parts and materials used in the manufacture of the items. . . ."

"... the Collector has always insisted that . . . [such] a tax . . ." be paid.

This flatly incorrect argument is discussed and analyzed at pages 62-66 of Halliburton's (blue) brief to the Louisiana Supreme Court, under the heading "*The Collector Attempts to Disavow his Own Stipulation of Facts.*" As noted, the Collector no longer makes this argument. Indeed, he now says it would be an "absurdity" to suggest it.

Before leaving Mr. Jones and his sea-going tax problems, we point out that, if he had bought his vessel already factory-finished and ready-made at a Louisiana shipyard, there would have been no 2% sales tax on the transaction because the Louisiana Sales Tax exempts vessels "built in Louisiana" shipyards.<sup>21</sup> Of course, if he had bought his ready-made boat at a Mississippi or Alabama<sup>22</sup> shipyard, its subsequent use in Louisiana would generate a 2% use tax and there is no comparable exemption for vessels "built outside Louisiana."

We note the Collector's argument that, if Mr. Jones brought a \$50,000 vessel into Louisiana from another state:

"If the taxpayer had brought the completed boat into the State, a 2% tax on the \$50,000 would have been imposed, because that was its value when Louisiana first acquired jurisdiction."

<sup>21</sup> La. R.S. 47:305.1, reproduced in Appendix "A" to Appellant's Original Brief, at p. 82.

<sup>22</sup> Assuming, hypothetically, that these states did not have sales tax laws.

Clearly, the Collector would demand the use tax on imported boats, although the sales and use tax statute specifically exempts vessels "built in Louisiana" shipyards. See Appellant's original Brief, at p. 53, under the heading "*Louisiana Plans Further Discrimination.*" See also the Brief *Amicus Curiae* of Thomas Jordan, Inc.

#### **Re Isolated Sales:**

The Collector argues that the lack of an isolated sales exemption from the use tax does not discriminate against the out-of-state vendor and in favor of the Louisiana market. He insists that it does not penalize Halliburton for going outside the state to make its casual purchase. He argues that it does not discriminate against the interstate transaction and in favor of the transaction which is wholly intrastate. He says, *inter alia*:

"... all property sold at isolated sales within the state has already been the subject of a two per cent (2%) tax, either sales or use, upon its first sale at retail, or upon its first use . . ."

(Appellee's Brief, at p. 22)

It is simply not a fact that "... all property sold at isolated sales within the state has already been the subject of a two per cent (2%) tax, either sales or use . . ."

It is unnecessary to go beyond the confines of matters already under discussion to find two examples which illustrate the error of the Collector's statement. Halliburton's "Labor and Shop Overhead Phase," and the Brief, *Amicus Curiae* of Thomas Jordan, Inc., (dealing with vessels "built in Louisiana") afford two illustrations in point.<sup>23</sup>

<sup>23</sup> See p. 82 and p. 55 of Appellant's original Brief.

Take the situation in which an intrastate manufacturer-user put together in Louisiana an item for its own use, as to which a substantial portion (e.g., two-thirds) of the cost-price was in labor and overhead. A 2% tax would have been paid only on the cost of the components and not on the portion of the cost-price attributable to labor and overhead. Upon a casual sale of such an item, in Louisiana, there would be no sales tax on the transaction, and only a fraction (one-third) of the cost-price (Cost Element No. 1) would have already borne its 2% tax.

Take the situation of a vessel "built in a Louisiana shipyard." The purchaser would pay no sales tax on the purchase price because of the specific exemption. And if another purchaser subsequently bought the boat at a casual sale, in Louisiana, there would be no sales tax upon the casual sale because of the casual sale exemption. On the other hand, if this second purchaser (e.g., Mr. Jones) had gone outside Louisiana and purchased an identical vessel at a casual sale, Louisiana would demand the 2% use tax because, unlike the sales tax, the use tax contains no isolated sale exemption.

It is submitted that the Collector's position is unsound. Please see p. 18, *et seq.*, of Halliburton's Original Brief for a full discussion of this phase.

**The Authority Cited by the Collector  
Does Not Support His Position.**

This Court has held:

"The commerce clause forbids discrimination whether forthright or ingenious. . . ."

<sup>24</sup> *Best v. Maxwell*, 311 U.S. 454, 61 S.Ct. 335, 85 L.Ed. 275 (1940).

This is a case of forthright discrimination which the Louisiana Collector has ingeniously described.

This Court has said:

"In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."<sup>25</sup>

The only case cited by the Louisiana Collector, to support his position, is *Henneford v. Silas Mason Company*.<sup>26</sup> In that case, this Court upheld the constitutionality of a non-discriminatory use tax, saying:

"The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, *non-discriminatory in its operation*, when they have become part of the common mass of property within the state of destination. . . .

"For like reasons they may be subjected, when once they are at rest, to a *non-discriminatory tax upon use or enjoyment*."<sup>27</sup>

This Court upheld the constitutionality of the use tax in the *Silas Mason* case upon finding that, in the "practical operation" of the taxes, there was a precise equality of tax burden

<sup>25</sup> *Best v. Maricell*, 311 U.S. 454, 61 S.Ct. 335, 81 L.Ed. 275 (1940).

<sup>26</sup> 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1936).

<sup>27</sup> 300 U.S. at pp. 582, 583.

in the (intrastate) sales tax and in the (interstate) use tax. Mr. Justice Cardozo pointed out that the State of Washington use tax *specifically exempted the Halliburton situation*, which is now before this Court, saying of the Washington use tax statute:

"Subdivision (b) provides that the use tax shall not be laid unless the property has been bought at retail. . . .

(300 U. S. at p. 580)

"The tax presupposes everywhere a retail purchase by the user before the time of use. *If he has manufactured the chattel himself, . . . he is exempt from the use tax* whether title was acquired in Washington or elsewhere.

(at p. 581)

"A non-discriminatory tax . . . has never been regarded as imposing a direct burden upon interstate commerce.

(at p. 582)

"The tax upon the use . . . is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them.

"Equality is the theme that runs through all the sections of the statute."

(at p. 583. Italics supplied.)

And, Mr. Justice Cardozo made it clear that the test was not one of form but of whether ". . . there was any substantial discrimination in fact." (at p. 585)

Of course, there is substantial "discrimination in fact" in this case, since the Collector would require Halliburton to pay more than three times as much tax, in this case, as he would have required if the elements of multi-state activity and interstate movement of goods were lacking.

### **All Authorities Support Halliburton's Position**

We reiterate this point, which has been demonstrated amply in our original brief. For the convenience of this Court, we refer to the extensively annotated comments in 129 ALR 222, entitled "*Constitutionality, Construction and Application of General Use Tax or Other Compensating Tax Designed to Complement State Sales Tax.*" This annotation is supplemented in 153 ALR 609.

As the Supreme Court of the United States put it in *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586 (1939):

"The prohibited burden upon commerce between the states is created by state interference with that commerce, . . . A discrimination against it, or a tax on its operations as such, is an interference."

(306 U.S. at 177-178, 83 L.Ed. at 593)

Careful combing of the jurisprudence of the states which have Sales and Use Tax statutes has revealed only one additional decision in which the point here at issue was discussed. In *Gray v. Oklahoma Tax Commission*,<sup>28</sup> the Supreme Court of

<sup>28</sup> No. 39211, Nov. 28, 1961<sup>2</sup> published in Vol. 32 of "The Journal," published by Oklahoma State Bar Association, at p. 2106.

Oklahoma considered the effect of a repeal of the *sales* tax section which dealt with livestock feed. At issue was the question of whether or not this left in effect the *use* tax upon feed purchased in other states. "The contention of the plaintiff [was] . . . that this 2% levy on out-of-state purchases constitutes a levy on interstate commerce and is, therefore, unconstitutional." (at p. 2106)

The Oklahoma Supreme Court found it unnecessary to pass upon the constitutional question, pointing out that the use tax specifically provided that its provisions ". . . shall not apply . . . to the use of . . . property now specifically exempted from taxation under the . . . Sales' . . . tax . . ." The Court said:

"The Legislature was cognizant of the restrictions imposed by the commerce clause of the Federal Constitution, and it was undoubtedly to escape the imposition of any invalidity by that document that the exemption quoted was made."

(at p. 2107)

It is Halliburton's conclusion that every written utterance in existence, save only the words of the Louisiana Supreme Court and the Louisiana Collector, supports Halliburton's sound position.

#### **Equal Protection of the Law—Due Process of Law**

The Collector states that the Louisiana Sales and Use Tax operates "the same" upon all persons "similarly situated."



The Collector has chosen to put Halliburton into a different "classification" from an intrastate operator in the same line of endeavor.

His dual classification of persons "similarly situated" is as follows:

CLASSIFICATION "A"  
To be taxed more heavily—  
(Ratio here: 3-to-1)

Those who operate in interstate commerce.

CLASSIFICATION "B"  
To be taxed lightly—  
(Ratio here 1-to-3)

Those who operate wholly within the State of Louisiana.

Thus, Classification "A" taxpayers (interstate operators) are all "similarly situated," and are all taxed heavily. And, Classification "B" taxpayers (intrastate operators) are all "similarly situated." They are all taxed more lightly.

It is upon these facts that the Collector argues:

"... the position of each taxpayer . . . *similarly situated* . . . is identical."

(Brief of Appellee at p. 21).

\* \* \*

The Collector, and the Louisiana Supreme Court, take great comfort from the argument that this use tax is

"... not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end."

(Brief of Collector, at p. 20)

and the concluding paragraph of the Collector's Brief states:

"... The tax is imposed for one reason only—because the property has become a part of the mass of property in the State . . . ."

(Ibid., at p. 27)

The Louisiana Supreme Court seemed to base its decision on this point, saying:

"... We conclude that . . . the use tax as applied to plaintiff does not infringe upon the regulation of interstate commerce by Congress. The taxed matter herein had definitely come to rest in Louisiana . . . ."

and, the Court added:

"... 'Equal protection cannot be said to be denied by a statute which operates alike on all persons and property similarly situated, . . . .'"<sup>29</sup>

Now, it seems to us—and we submit to this court—that where the test for the levy or non-levy of the discriminatory tax is the existence or non-existence of interstate commerce, then the interstate commerce clause—standing alone—is quite enough to void the discriminatory tax. Thus, Halliburton would base its conclusions here upon the protection afforded by the interstate commerce clause.

Nevertheless, quite aside from the operations of the interstate commerce clause, we submit that this is a case of gross discrimination which is forbidden by the equal protection of the laws clause and the due process clause.

Assume, *arguendo*, that Halliburton were a wholly intra-state operator, sitting side-by-side, in Louisiana, with another

<sup>29</sup> Reproduced at p. 61 of Appellant's Jurisdictional Statement.

<sup>30</sup> Ibid., at p. 63.

intra-state operator. And assume that Halliburton was being taxed three-times-as-heavily as this neighboring competitor, just as it is here.

It is Halliburton's position that there is simply no excuse in law for taxing it three-times-as-much as another company—in exactly the same business—would be taxed, even if there were no interstate commerce element here. *A fortiori*, such tax discrimination cannot be valid where the only criterion of taxability is the presence or absence of interstate movement of goods.\*

We here cite some of the pertinent decisions of this Court:

- (1) *International Harvester Co. v. Dept. of Treasury (Indiana)*, 322 U.S. 340, 88 L.Ed. 1313 (1944).

Concurring opinion of Mr. Justice Rutledge:

"'Due Process' and 'commerce clause' conceptions are not always sharply separable in dealing with these problems. Cf, e.g., *Western U. Teleg. Co. v. Kansas*, 216 U.S. 1, 54 L.Ed. 355, 30 S.Ct. 190. To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes upon commerce among the states becomes 'undue.'"

(322 U.S., at 353, 88 L.Ed. at 1321, 64 S.Ct. 1019)

\* \* \*

- (2) *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 93 L.Ed. 1545 (1949)

---

\* Actually, after "commerce is at an end," Halliburton is a purely intrastate operator, with a history of interstate commerce in the past. It is this history of interstate movement which gives rise to separate tax "classification" by Louisiana.

Here the State of Ohio imposed an ad valorem tax upon intangible property such as notes and accounts receivable, owned by foreign corporations and owing from out-of-state debtors, but exempted at the same time identical property owned by its residents and domestic corporations.

*Held:* Tax is invalid as violating the equal protection clause of the Fourteenth Amendment.

Mr. Justice Jackson said:

"After a state has chosen to domesticate foreign corporations, the adopted corporations are entitled to equal protection . . . .

(377 U.S. at 571)

\* \* \*

"We think these discriminations deny appellants equal protection of Ohio law."

(at p. 574)

Concerning the *Wheeling* case, Mr. Justice Brennan said in a separate opinion in *Allied Stores of Ohio v. Powers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed. 2d 480 (1959):

"... *Wheeling* teaches that a distinction which burdens the property of nonresidents but not like property of residents is outside the constitutional pale.

\* \* \*

"... The proper analysis, it seems to me, is that *Wheeling* applied the Equal Protection Clause to give effect to its role to protect our federalism by denying Ohio the power constitutionally to discriminate in favor of its own residents against residents of other state members of our federation."

(3 L.Ed. 2d at p. 488)

- (3) *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 93 L.Ed. 585, 69 S.Ct. 432 (1949)

Mr. Justice Douglas said:

" . . . So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits or protection conferred or afforded by the taxing state."

(336 U.S. 174, 93 L.Ed. at p. 589)

" . . . Interstate commerce can be made to pay its way by bearing a *non-discriminatory* share of the tax burden which each State may impose on the activity or property within its borders."

(336 U.S. 174, 93 L.Ed. 590)

(Italics supplied.)

- (4) *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376, 4 L.Ed. 2d 384, 80 S.Ct. 474 (1960)

This decision deals with taxation of certain property owned by the United States, but its language relating to discrimination and classification is very pertinent here:

Mr. Chief Justice Warren (for a unanimous court) said:

"The discrimination seems apparent. The question, however, is whether it can be justified . . .

(at p. 389)

"The taxing statute does not operate in a vacuum. . . . It is necessary to see how other taxpayers similarly situated are treated."

"We must focus on the nature of the classification. . . . The imposition of a heavier tax burden . . . must be justified by significant differences between the two classes."

- (5) *General Trading Co. v. State Tax Commission (Iowa)*, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309 (1944)

Dealing with Iowa use tax, Mr. Justice Frankfurter said:

"Of course, no State can tax the privilege of doing interstate business. See *Western Live Stock v. Bureau*, 303 U.S. 250, 82 L.Ed. 823, 58 S.Ct. 546, 115 ALR 944. This is within the protection of the Commerce Clause and subject to the power of Congress.

"On the other hand, the mere fact that property is used for interstate commerce or has come within an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his *fair share*. But a *fair share* precludes legislation obviously hostile or practically discriminatory toward interstate commerce. See *Best v. Maxwell*, 311 U. S. 454, 85 L.Ed. 275, 61 S.Ct. 334."

(322 U.S. 339, 88 L.Ed. at 1312. Italics supplied.)

Arbitrary, unreasonable and discriminatory classification for tax purposes is a violation of the due process and equal protection of the laws clause. One of the most thorough discussions of the limitations upon state action, imposed by these two clauses is found in *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, at p. 559, 22 S.Ct. 431, 46 L.Ed. 679, at p. 689 (1902), to which this Court is respectfully referred. Portions of that

opinion (which is not a tax case) are reproduced as Appendix "A," to this brief.<sup>31</sup>

In sum, we submit that the cumulative fiat of the due process clause, and the equal protection of the laws clause, and the interstate commerce clause, strike down the arbitrary, discriminatory and capricious position which the Louisiana Collector takes here, in his efforts to lay a toll upon interstate commerce.

## CONCLUSION

Upon the foregoing, appellant Halliburton Oil Well Cementing Company respectfully submits that all of its propositions herein are true, and correct, and sound, namely:

**A. THE LAW:**

Tax discrimination against interstate commerce is forbidden by the Federal Constitution. This is the rule.

(This is admitted.)

**B. THE FACT:**

The Louisiana Tax Collector is discriminating against interstate commerce.

(The discrimination, at a ratio of 3-to-1, is stipulated.)<sup>32</sup>

**C. THE CONCLUSION:**

The discrimination by the Louisiana Tax Collector is an unconstitutional burden upon interstate commerce.

(All authority, and all reason, support this sound position of the Appellant.)

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<sup>31</sup> Page 48, *infra*.

<sup>32</sup> The stipulation, to be exact, is that no tax would be due, if the interstate commerce element were lacking. See p. 9, *supra*, for quotation.



Appellant submits that the use tax, in this case, cannot constitutionally exceed what the sales tax would have been, had there been no element of interstate commerce. The interstate use tax cannot exceed the intrastate sales tax.

"For, only if there is an *equivalency of tax burden* . . . can it be said that the purchasers of out-of-state goods are not discriminated against. . . ." <sup>33</sup>

Appellant submits that the position of the Louisiana Collector of Revenue is repugnant to the Constitution of the United States, and particularly the following clauses thereof: the *interstate commerce* clause, and the *equal protection of the laws* clause and the *due process* clause of the Fourteenth Amendment.

Appellant submits that the decision of the Supreme Court of the State of Louisiana should be reversed.

Respectfully submitted,

C. VERNON PORTER

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Baton Rouge, Louisiana  
February 14, 1962

<sup>33</sup> Hartman, Paul J., *State Taxation of Interstate Commerce*, Dennis & Co., Inc., Buffalo 3, N.Y., at p. 167. See p. 53 of Appellant's original brief for more complete quotation.

## PROOF OF SERVICE

I, Benjamin Brown Taylor, Jr., one of the attorneys for Halliburton Oil Well Cementing Company, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of February, 1962, I served a copy of the foregoing *Reply Brief for the Appellant*, upon the following named persons, by mailing—postage prepaid—a copy thereof to each of them at their offices at the respective addresses set out opposite the name of each, viz.,

- (1) Roland Coreham, Collector of Revenue, Appellee  
     % Chapman Sanford, Attorney of Record, and  
     John B. Smullin, Attorney of Record  
     Capitol Annex Building  
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- (2) Humble Oil and Refining Company, *Amicus Curiae*  
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Company, *Appellant*

Baton Rouge, Louisiana  
February 14, 1962.

## APPENDIX "A"

In *Cennolly v. Union Sewer Pipe Co.*, 184 U.S. 540, at p. 559, 22 S.Ct. 431, 46 L.Ed. 679, at pp. 689-690 (1902), the Supreme Court dealt with the equal protection of the laws clause and the due process clause\* and said:

"What may be regarded as a denial of the equal protection of the laws, is a question not always easily determined. As the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the *equal protection of the laws* means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Missouri v. Lewis*, 101 U.S. 22, 31, *sub nom. Bowman v. Lewis*, 25 L.ed. 989, 992. We have also said: "The 14th Amendment, in declaring that no state "shall deprive any person of life, liberty, or property without *due process of law*, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, not only that there should be *no arbitrary deprivation* of life or liberty, or arbitrary spoliation of property, but that *equal protection* and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as

\* See p. 37 et seq., *supra*, for discussion.

applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.' *Barbier v. Connolly*, 113 U.S. 27, 31, 28 L.ed. 923, 924, 5 Sup. Ct. Rep. 357, 359. This language was cited with approval in *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 30 L.ed. 220, 226, 6 Sup. Ct. Rep. 1064, 1070, in which it was also said that 'the equal protection of the laws is a pledge of the protection of equal laws.' In *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L.ed. 578, 580, 7 Sup. Ct. Rep. 350, 352, we said that the 14th Amendment required that all persons ~~subject to~~ legislation limited as to the objects to which it is directed, or by the territory within which it is to operate, 'shall be treated alike, under like circumstances and conditions both in the privileges conferred, and in the liabilities imposed.' 'Due process of law and the equal protection of the laws,' this court has said, 'are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L.ed. 485, 487, 14 Sup. Ct. Rep. 570, 572. Many other cases in this court are to the like effect.

"The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never be justified by calling its classification. The equal protection demanded by the 14th Amendment

forbids this. . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that *equality of rights* which is the foundation of free government. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it *must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground, —some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection.* *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 159, 160, 165, 41 L. ed. 666, 668, 670, 671, 17 Sup. Ct. Rep. 255, 257-259, 261. These principles were re-stated and applied in *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, *sub nom. Cottong v. Godard*, ante, 92, 22 Sup. Ct. Rep. 30, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock-yards company in the state, but which exempted certain stock yards from its operation, was repugnant to the 14th Amendment in that it denied to that company the equal protection of the laws."

(Italics supplied.)

JUN 5 1963

JOHN F. DAVIS, CLERK

In the

**Supreme Court of the United States**

OCTOBER TERM, 1961

HALLIBURTON OIL WELL CEMENTING COMPANY,  
Appellant,

v.

JAMES S. REILY, COLLECTOR OF REVENUE  
STATE OF LOUISIANA (SINCE SUCCEEDED BY  
ROBERT L. ROLAND, WHO WAS DULY SUCCEEDED  
BY ROLAND COCREHAM),  
Appellee.

**APPLICATION FOR REHEARING ON BEHALF  
OF THE COLLECTOR OF REVENUE,  
STATE OF LOUISIANA**

CHAPMAN L. SANFORD,

Attorney of Record upon whom  
service may be made.

Room 403

Capitol Annex Building  
Baton Rouge, Louisiana



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**APPLICATION FOR REHEARING ON BEHALF  
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The petition of the Collector of Revenue of the State of Louisiana, defendant and appellee, in the above entitled and numbered cause respectfully represents that the judgment of this Honorable Court rendered herein on the 13th day of May, 1963, reversing the judgment of the Supreme Court of the State of Louisiana, is erroneous and contrary to law and is prejudicial to the State of Louisiana for the following reasons:

1.

Even if it were to be conceded that the opinion

of the Court would be correct under facts showing different treatment of in-state and out of state manufactures of items to be used, not sold, there are no such facts in the record of this case.

## 2.

Neither the facts in the stipulation of the parties nor the allegations of the petition establish a cause of action or justiciable controversy with regard to the question of discrimination against interstate commerce because the arguments are based upon conjecture.

## 3.

There is no showing that Halliburton has, in fact, suffered discrimination. There is neither a plea nor evidence that another taxpayer is being favored.

## 4.

The decision in this case violates the long established policy of this Court not to test a statute's constitutionality in the abstract, nor to render a declaratory judgment when a controversy based upon real and actual facts does not exist.<sup>1</sup>

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1. The Court has refused to determine the constitutionality of abstract questions in numerous cases. An excellent presentation in a closely analogous case is contained in *Ashwander vs. Tennessee Valley Authority*, (1936) 297 U.S. 288, 56 S. Ct. 466, wherein this Court pointed out:

"The Scope of the Issue. We agree with the Circuit

The petition of Halliburton alleges only a hypothetical situation upon which the plea of discrimination against interstate commerce is based<sup>2</sup>. No fact-

2. Allegation XI of the petition states in part :

"As to each of the aforesaid three phases of this case, the taxpayer alleges—inter alia—that the Use Tax, if interpreted and applied as the Collector would interpret and apply it here would cast upon the taxpayer (petitioner) a burden more onerous than that *which would be levied by the Louisiana Sales and Use Tax had the transactions involved occurred in Louisiana.*" (Emphasis supplied)

Allegation IXV in the last sentence also indicates only a hypothetical situation :

"In sum, the tax burden would fall upon persons who conduct such shop operations outside Louisiana, and then cross the state line in Louisiana, but such tax burden *would not fall upon persons who conduct identical operations just inside the Louisiana interstate border line.*" (Emphasis supplied)

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Court of Appeals that the question to be determined is limited to the validity of the contract of January 4, 1934. The pronouncements, policies, and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining. The judicial power does not extend to the determination of abstract questions. *Muskrat v. United States*, 219 U.S. 346, 361, 31 S.Ct. 250, 55 L.Ed. 246; *Liberty Warehouse Company v. Grannis*, 273 U.S. 70, 74, 47 S.Ct. 282, 71 L.Ed. 541; *Willing v. Chicago Audi-*

torium Ass'n, 277 U.S. 274, 289, 48 S.Ct. 507, 72 L.Ed. 880; *Nashville, Chattanooga & St. Louis R. Co. v. Wallace*, 288 U.S. 249, 262, 264, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191. It was for this reason that the Court dismissed the bill of the state of New Jersey which sought to obtain a judicial declaration that in certain features the Federal Water Power Act exceeded the authority of the Congress and encroached upon that of the state. *New Jersey v. Sargent*, 269 U.S. 328, 46 S.Ct. 122, 70 L.Ed. 289. For the same reason, the state of New York, in her suit against the state of Illinois, failed in her effort to obtain a decision of abstract questions as to the possible effect of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future. *New York v. Illinois*, 274 U.S. 488, 47 S.Ct. 661, 71 L.Ed. 1164. At the last term the Court held, in dismissing the bill of the United States against the state of West Virginia, that general allegations that the state challenged the claim of the United States that the rivers in question were navigable, and asserted a right superior to that of the United States to license their use for power production, raised an issue 'too vague and ill-defined to admit of judicial determination.' *United States v. State of West Virginia*, 295 U.S. 463, 474, 55 S.Ct. 789, 79 L.Ed. 1546. Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention. *Arizona v. California*, 283 U.S. 423, 462, 51 S.Ct. 522, 75 L.Ed 1154.

The Act of June 14, 1934, providing for declaratory judgments, does not attempt to change the essential requisites for the exercise of judicial power. By its terms, it applies to 'cases of actual controversy,' a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts. See *Nashville, Chattanooga & St. Louis R. Co. v. Wallace*, *supra*. While plaintiffs, as stockholders, might insist that the board of directors should take appropriate legal measures to extricate the corporation from particular transactions and agreements alleged to be invalid, plaintiffs had no

right to demand that the directors should start a litigation to obtain a general declaration of the unconstitutionality of the Tennessee Valley Authority Act in all its bearings or a decision of abstract questions as to the right of the Authority and of the Alabama Power Company in possible contingencies." (297 U.S. 288, 324; 56 S.Ct. 466, 472)

A statement applying the principle regarding declaratory judgments is contained in *Angell vs. Schram*, (1940) 109 F 2d 380, Sixth Circuit, wherein the Court explained the rationale of the Declaratory Judgments Act:

"The rationale of the act contemplated a declaration in respect of a cause of action residing in the parties, which means a legal demand of one's right with judicial relief.

"It is not essential to the jurisdiction of the court under the act that some wrong is immediately threatened but the mere surmise that some right or claim may be asserted does not confer jurisdiction. The seeds of a controversy must sprout before the court may take notice.

"The plaintiff must establish facts which give rise as a matter of law to an existing or imminent invasion of his rights by the defendant which would result in injury to him. This rule is fundamental and in order to maintain an action, the injury must flow directly from, and be the probable and natural result of, the wrong of which plaintiff complains. This concept excludes all remote and incidental matters and is confined solely to the determination of controversies, actual or contemplated, between the parties. *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000."

(Emphasis Supplied, 109 F 2d 380, 381)

The court saw fit to state further:

"The court lacks the power to declare rights in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action or where the declaration under all circumstances is not necessary or proper at the time." (109 F 2d 380, 382)

ual discrimination is pleaded. It is factual, of course, that the Collector has included shop overhead and labor in computing the tax basis for Halliburton's trucks, but the stipulation that the Collector *would not* include shop overhead and labor in the cost basis if they produced trucks in Louisiana is merely a suggested application under a hypothetical set of facts, and not binding on the Collector.

## 6.

There is no evidence in this record that the Collector actually discriminated against Halliburton nor that he favors any local taxpayer. The evidence shows only a hypothetical situation.

## 7.

To allow the judgment to stand will settle nothing. The facts of this case do not call for a judicial

3. This is Section III of the stipulation quoted by the Court on page 3 of the opinion. It is the last paragraph of Section III of the stipulation:

"If petitioner had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, *there would* have been a sales tax due to the State of Louisiana upon the cost of the materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but *there would* have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead."  
(Emphasis supplied)

The court has made this section of the stipulation the very basis of its decision.



interpretation of the Louisiana tax statute. The facts do not even call for a judicial pronouncement upon what the Collector is doing. The facts only call for a pronouncement upon what the Collector "*would*" do "if . . . ." Surely parties may not by stipulation create a justiciable issue if none in fact exists.

### 8.

The judgment leaves the entire matter as to the meaning and application of the Louisiana statute as to local manufacture-consumers in a state of flux. While the Collector must now concede that his suggested application was not legal, the language of the statute does not require such an application. There

4. The pertinent provisions are contained in Title 47 of the Louisiana Revised Statutes:

"\* \* \* \* \*

§ 301 (4) "Dealer" includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution or for storage to be used or consumed in this state.

"Dealer" is further defined to mean:

"(a) every person, who imports, or caused to be imported, tangible personal property from any state or foreign country for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state;

"(b) every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in this state, tangible



is no evidence of an application of the law as suggested in the stipulation, not even in an isolated instance. The Collector of Revenue immediately will be right back in Court with this same taxpayer and will, properly, be unwilling to suggest how he will apply the statute until met with a particular factual situation demanding a ruling.

## 9.

The complainant has failed to make a case with regard to the question of discrimination against interstate commerce insofar as the shop overhead and

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personal property as defined herein:

"(c) Any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this Chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of said tangible personal property;

\* \* \* \*

§ 301 (15) "'Storage' means and includes any keeping or retention in this state of tangible personal property for use or consumption in this state, or for any purpose other than for sale at retail in the regular course of business."

\* \* \* \*

§ 301 (18) "'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business."

§ 301 (19) "'Use tax' includes the use, the con-

labor phase is concerned because he has failed to show that the tax statute itself is discriminatory and has failed to show a discriminatory application. Indeed, complainant has failed even to plead *facts* sufficient to establish a justiciable controversy with regard to the question of discrimination against interstate commerce insofar as the shop overhead and labor phase is concerned.

# 10.

This Honorable Court has erred in distinguish-

sumption, the distribution and the storage, as herein defined."

§ 302 A "There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

"\* \* \* \*

"(2) At the rate of two percentum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax."

§ 305 "The 'use tax', as defined herein, shall not apply to livestock and livestock products, to poultry and poultry products, to farm, range and agricultural products when produced by the farmer and used by him and members of his family." (This intimates a use tax on all other products produced for use in the state.)

These sections apparently contemplate an application of the use tax to all tangible personal property not subjected to a sales tax—whether or not such property has been imported.

ing the incidence of the sales tax and the use tax because the incidence of both is identical.

The Court has failed to realize that neither the sales tax nor the use tax distinguishes between in-state and out-of-state taxpayers. Both the sales tax and the use tax apply to the *first taking for use* in Louisiana by the consumer. The consumer, no matter who he is, is the taxpayer in the case of each tax.

Louisiana Legislative competence does not extend beyond its borders. Legislative competence does not apply until commerce is at an end. Certainly, after property comes within its jurisdiction Louisiana can tax the first use in all cases—whether by virtue of the sales tax or use tax.

If the incidence of tax is identical, if the rate of tax is identical, if the measure—fair market value—is the same in all cases, how can there be discrimination? Even if the facts were presented sufficiently to demand the Court's expression the result reached must be incorrect. The reasons contained in the dissenting opinion are clear and logical. Therefore, if the Court feels that a justiciable controversy exists, then the Collector of Revenue of the State of Louisiana, for the reasons expressed in the dissent respectfully requests a rehearing.

## 11.

Because the sales tax law *specifically* provides

that used or second-hand merchandise shall bear the sales tax,<sup>5</sup> the Court is further in error when it suggests on Page 9 of the opinion that the Louisiana law favors the local second-hand market.

## 12.

The Court in considering the statement by the Louisiana Supreme Court that "the exemption of an isolated sale from the provisions of the sales tax applies strictly to sales within the State of Louisiana; it has no effect whatsoever on any transaction without the State."<sup>6</sup> failed to understand the connotation and purpose of the statement. The Supreme Court of Louisiana was not "baldy" admitting disparate treatment but was expressing the lack of legislative competence or jurisdiction beyond the boundaries of Louisiana. The Louisiana Supreme Court understood the importance time and place in the exaction of the tax. In considering *place* Louisiana may not impose a sales tax on sales outside Louisiana—it has no legislative competence to do so. How can it be expected then that the Louisiana Legislature could exempt a sale in another state from tax when it never had jurisdiction to

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5. RS. 47:305 provides in part:

"In interpreting this provision, the term 'new article' means the original stock in trade of the dealer and shall not be limited to newly manufactured articles. The original stock or article, *whether it be a used article or not*, shall be subject to the tax." (Emphasis supplied)

6. Commented upon on page 9 of the opinion of this Court.

tax it in the first place. In point of time Louisiana must decide when the tax it seeks to impose shall apply. We have already seen that it cannot apply until Louisiana has jurisdiction of the *place*—i.e. it must be in Louisiana. Louisiana in deciding when the tax must be paid chose *the first possession by the consumer*. This is the most logical time, of course, because it is definite and easily ascertained by the mark of the retail sale. When the item is not sold but is used it is again the *first possession by the consumer* (within the jurisdiction) that is marked by the property being taken out of commerce with the view of being used in Louisiana.

## 13.

Louisiana exacts a sales tax when a second-hand item is sold at retail—why can it not tax an equivalent use in Louisiana when the property is subject to its jurisdiction?

Wherefore, the Collector of Revenue of the State of Louisiana prays that a rehearing be granted in this cause and that after due proceedings the judgment rendered herein on the 13th day of May, 1963, be set aside and that the appeal of Halliburton Oil Well Cementing Company be dismissed.

CHAPMAN L. SANFORD,  
Attorney for the Collector of  
Revenue, State of Louisiana.  
Room 403  
Capitol Annex Building  
Baton Rouge, Louisiana

**CERTIFICATE**

I, Chapman L. Sanford, attorney for the Collector of Revenue of the State of Louisiana, certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

Baton Rouge, Louisiana, this 4th day of June,  
1963.

CHAPMAN L. SANFORD  
Attorney for the  
Collector of Revenue

## PROOF OF SERVICE

I, Chapman L. Sanford, attorney for the Collector of Revenue of the State of Louisiana, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the fourth day of June, 1963, I served a copy of the foregoing *Application for Re-Hearing*, upon the following named persons, by mailing—postage prepaid—copies to each of them at their offices at the respective addresses set out opposite the name of each, viz.,

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Baton Rouge, Louisiana  
June 4, 1963